(25,731)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 901.

CHICAGO GREAT WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

L. W. BASHAM, ADMINISTRATOR OF THE ESTATE OF JOHN J. SPELLMAN, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

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1 Service of the within Abstract of Record is hereby accepted and receipt of copies acknowledged this — day of ——, 1914.

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Attorneys for Appellee.

In the Supreme Court of Iowa, September Term, 1914.

At Law.

L. W. BASHAM, Administrator of the Estate of John J. Spellman, Deceased, Appellee,

vs.

CHICAGO, GREAT WESTERN RAILROAD COMPANY, Appellant.

Appeal from Polk County District Court.

Hon. C. A. Dudley, Judge.

Carr, Carr & Evans, Attorneys for Appellant.
Clark, Byers & Hutchinson and Thos. A. Cheshire, Attorneys for Appellee.

Appellant's Abstract of Record.

2 On the 21st day of April, 1911, the plaintiff filed in the office of the Clerk of Polk County District Court, the following

Petition.

Comes now the plaintiff and for cause of action states:

That he is the duly appointed, qualified and acting administrator of the estate of John J. Spellman, deceased.

That the defendant is a corporation for pecuniary profit engaged in owning and operating a railway throughout the states of Iowa, Illinois, Minnesota, Missouri and Kansas.

That the plaintiff's decedent, John J. Spellman, on the 28th day of March, 1910, and for some time prior thereto, was an employe of the defendant railroad company, as an engineer, and the engines on which he worked were used for drawing a regular passenger train running between Kansas City, Kansas, and Chicago, Illinois. The run of Spellman being between Des Moines and Oelwein, Iowa.

That on the 28th day of March, 1910, the plaintiff's decedent, John J. Spellman, was on his engine drawing the regular passenger train on said railway from Des Moines to Oelwein, and as his engine reached the yards of the Great Western Railroad Company at Oel-

wein, it suddenly left the main track on which it was running, at one of the switches of the defendant railroad company in its yards, which switch had been left open by some of the train men of the defendant company.

That soon after the engine on which the plaintiff's decedent was the engineer, left the main track of defendant's railway, on account of the open switch, it became derailed and turned over, and the engineer, John J. Spellman was caught thereunder and injured and his body and person were scalded by hot water which came
3 from the boiler of the engine immediately after it overturned, and as a result of his said injuries on the following day the said John J. Spellman died.

The plaintiff further states that the defendant railroad company was negligent in that it did not exercise ordinary care in furnishing its employe, the said John J. Spellman, with a reasonably safe track on which to run his engine, in that it permitted its switch to be open in the yards at Oelwein, and thereby the engine on which the said Spellman was in the discharge of his duties, was side-tracked and derailed.

The defendant was further negligent in that it permitted its switch to be open at the point and place where the engine of John J. Spellman was transferred from the main line track on which it was running, to a side track and derailed.

The defendant was further negligent in that its employes handling and moving its engine and cars in its yards at Oelwein had opened said switch and permitted the same to be and remain open at a time when the said company and its said employes in the yards at Oelwein, knew that the train on which the plaintiff's decedent, John J. Spellman, was engineer, was due, and that his train would be side-tracked on account of said switch being open.

The defendant was further negligent in that neither it or its employes moving and handling its trains in the yards at Oelwein, and who had opened and left said switch open, did not signal or otherwise inform the plaintiff's decedent, John J. Spellman, of the fact that said switch had been opened and was open at the time and just before the engine of the said Spellman reached said switch.

The plaintiff further states that the said John J. Spellman did not know that said switch was open, or that there was any danger on the main line where his train was running, at the point and place where his engine left said track and at the time he was injured was in the exercise of due care and did not in any manner or degree contribute to his injury.

4 The plaintiff further states that on account of the death of the said John J. Spellman, deceased, his estate has suffered and sustained great damages, to wit, the sum of twenty thousand ($20,000.00) dollars.

Wherefore, plaintiff demands judgment against the defendant in the sum of twenty thousand ($20,000.00) dollars together with interest thereon at the rate of six per cent per annum from the date of the rendition of the verdict herein, together with all costs of this suit.

On the 9th day of May, 1911, the defendant filed the following

Demurrer

to said petition:

Comes now defendant and demurs to the plaintiff's petition herein for the reason that the facts stated in said petition do not entitle the plaintiff to the relief demanded nor to any relief for the following reasons:

1. It appears from the allegations of the petition that plaintiff's decedent, John J. Spellman, was at the time he was injured, engaged in an act of interstate commerce, and that the right of action upon the allegations of the petition accrued to the said Spellman under the Act of Congress approved April 22, 1908, and that no right of action accrued under the laws of the state of Iowa, said act being exclusive and superseding all laws of the state on the subject.

2. It appears from the allegations of the petition that said Spellman lived for a day after the said injuries were received and that the right of action and the only right of action on account of injuries to the said Spellman as set forth in the petition, accrued to the said Spellman during his lifetime, and under the said act of Congress said right of action did not survive to his personal representative, the plaintiff herein.

3. The said Act of Congress as it existed at the time of the injury to and death of the said Spellman did not provide that a right of action accruing to an injured employe should survive his death, and no right of action on account of the death of said Spellman accrued to the plaintiff as his personal representative for the reason that the death of the said Spellman was not instantaneous.

4. The right of action, which under the allegations of the petition, accrued to said Spellman during his lifetime not having survived his death, and no right of action having accrued to his personal representative, the plaintiff herein, because of the fact that the death of the said Spellman was not instantaneous, the facts stated in the petition do not state a cause of action entitling the plaintiff to any relief.

Said demurrer was on the 12th day of January, 1913, overruled, and on the 21st day of January, 1913, the defendant filed the following

Answer.

Comes now defendant and answering the petition of plaintiff herein, states:

Division I.

It denies each and every allegation in said petition contained.

Division II.

Further answering, and by way of plea in mitigation, defendant states that the injury to and death of plaintiff's decedent

6 was due to the contributory negligence and lack of ordinary care of said decedent in failing to observe said open switch and in failing to stop his engine in time to avoid the side-tracking and derailing of the engine.

Thereafter, and on the 13th day of October, 1913, plaintiff filed the following

Amendment to Petition.

Comes now the plaintiff and amends his petition and states:

That the said John J. Spellman left surviving him a widow, Fannie L. Spellman, who at the time of the death of the said John J. Spellman, was dependent upon him and to whom the said John J. Spellman, previous to his death, gave and contributed the wages which said John J. Spellman earned as engineer on defendant's railway.

That the said John J. Spellman for a long time before and at the time of his death was earning the sum of about One Hundred and Seventy-five dollars per month, all of which he gave to his wife, who is his surviving widow.

The plaintiff further states that he brings this action for the benefit of the said Fannie L. Spellman, the surviving widow of the said John J. Spellman, deceased.

Wherefore, plaintiff demands judgment as set forth in his original petition.

On the 17th day of October, 1913, defendant filed the following

Motion to Strike Amendment to Petition.

Comes now the defendant and moves the court to strike from the files plaintiff's amendment to the petition herein, filed October 13, 1913, for the following reasons:

7 1. Said amendment was filed without leave of court, without notice to defendants of intention to file the same, and without any opportunity being given to defendant or its counsel to object to the filing of the said amendment.

2. Said amendment sets up a new and independent cause of action.

3. Said amendment was filed after the issues had been made up and the case assigned for trial.

4. The cause of action pleaded in the petition as amended, is barred by the statute of limitations.

Said Motion was on the 20th day of October, 1913, overruled to which ruling defendant excepted, and defendant thereupon filed the following

Amended and Substituted Answer.

Comes now the defendant and answering the petition as amended, files this its amended and substituted answer, and states:

Division I.

It denies each and every allegation in said petition, as amended, contained.

Division II.

And further answering, and by way of plea in mitigation, defendant states that the injury to and death of plaintiff's decedent was due to the contributory negligence and lack of ordinary care of said decedent in failing to observe said open switch, and in failing to stop his engine in time to avoid the side-tracking and derailing of said engine.

8 Division III.

And further answering, and by way of a separate and distinct defense, defendant alleges that plaintiff's decedent died on the twenty-ninth day of March, 1910; that the cause of action, upon which the plaintiff now seeks to recover, was not alleged nor set up until the filing of the amendment to plaintiff's petition on October 13, 1913, and more than two (2) years after the said cause of action arose.

Defendant alleges that the cause of action set forth in plaintiff's petition, as amended, is barred by the statute of limitations, and plaintiff is barred and estopped from recovering thereon.

At the close of the evidence upon the trial of said case, the plaintiff was permitted to amend his petition as follows:

"Comes now the plaintiff and amends his petition as already amended and to conform the pleadings to the proof, and states:

That Fanny L. Spellman, the surviving widow of the said John J. Spellman, has suffered and sustained great damages, to wit: the sum of $20,000.00, on account of the death of said John J. Spellman. The plaintiff further states that he withdraws from his original petition the following words to wit: 'the plaintiff further states that on account of the death of the said John J. Spellman, deceased, his estate has suffered and sustained great damages, to wit, the sum of $20,000.00,' the said words being merely a statement of an erroneous legal conclusion.

Wherefore, plaintiff demands judgment against the defendant in the sum of $20,000.00 together with interest thereon at the rate of six per cent per annum from the date of the rendition of the verdict herein, with all costs of this suit.

9 It was agreed that the amended and substituted answer of defendant should stand also to the petition as finally amended.

On October 21, 1913, this cause was tried to a jury and on the trial the following proceedings were had:

Bill of Exceptions.

Plaintiff's Evidence.

James Sheriff, a witness for the plaintiff, testified:

My name is James Sheriff; I am thirty-nine years of age, and live at Waterloo. I run a garage. I was in the employ of the Chicago, Great Western Railroad Company in 1902 and 1907, as a machinist. During this employment, part of the time I lived at Waterloo and part of the time at Oelwein. I knew John J. Spellman in his lifetime. I remember the time of his injury which was the 28th or 27th day of March, 1910, I think the 28th. I was in the smoking car on the second seat on the left hand side of the train of which Mr. Spellman was the engineer. I spoke to him at Waterloo where I got on the train. The train left the track at the switch at Oelwein; the switch known as the high switch. We were running at a fair rate of speed. All at once the brakes were set; slid me from my seat up against the seat ahead. The dust commenced to fly. Then I felt them lurch, and it couldn't have been over a half a minute from the time of the lurch until they was dead still. I looked out of the window and saw the fireman running around the engine. I crawled between the tender and the front end of the baggage car and tried to find the engineer. The steam was coming out so bad I couldn't see him. I still endeavored to crawl closer and kept getting closer and closer. The steam all at once raised a little and I saw a hand. I saw the conductor behind me and said, "Here he is, under here." Mr. Spellman was partly under the engine. He was under what we call the reverse lever, lying with his knees across the rail on the opposite track and his head clear under the center in the boiling hot water. The engine was on its right side, flat down. It was about one car length from the switch. If I am not badly mistaken the back trucks of the baggage car itself were standing on the switch and the cars hadn't come uncoupled. The track was destroyed from the frog beyond where they turn, from the frog beyond the switch. I judge about ten or twelve feet. The track at the switch point was perfect, although showing that it was turned to be on the side track. They were neither against the rail where they should have been on either side. I should say there was enough to allow the flange to pass through freely. By the flange, I mean the inside of the wheel that goes down to keep the cars from running off the track. The wheels of the engine have flanges and the wheels on all the cars and tender. The switch point was far enough away to let the flange go through—I think about an inch to an inch and a half. I examined the switch and found the lever to be raised so that the switch could be turned either way, and the lock hanging in what I call the eye. The lock was not locked, and the handle stood up about a third of the way or maybe a little

more. I had been familiar with the locality of this switch since 1903. I looked at the target on this switch and found it showing an angle of about 45 degrees. The main line at that point runs on a northeasterly direction at the switch. As you approach the switch stand from the south, the target showed an angle of 45 degrees. The switch stand could not be seen clearly from the south—the way the sun was shining it made a blur on it. The closer you got
11 to it, it says it is partly open. You could see that when you got within seventy feet of it. It was a clear day and the sun was shining bright.

(Witness is here shown photographs which the reporter marked Exhibits "A," "B" and "C.")

Exhibit "C" shows the switch stand as it stood there or part of it. It is shown on the south side of the track of the main line. The switch stand is this object in the photograph with the lock on it and lever. The lever as shown in the photograph, Exhibit "C," shows it to be down and locked. When I saw it immediately after the wreck, it was nearly one-half way up. The lever in that position would be above the eye of the lock. The lever is taken and raised up, unlocked and raised up. And at the top of the switch is a square and it is about three or four inches deep. You have to raise your lever up high enough in order to get this out of the square before you can turn it around to throw the track. There is a lock with an eccentric at the bottom that throws them from one rail to the other—moves them over. When the lever is placed in such a position as to be low enough that the eye goes through the lever, between the sides of the lever, and the lock is then inserted in the eye, either locked or unlocked, the tracks could not be moved before the lock was taken out of the eye and the lever raised. To move a train from the main track to the "Y" track, the square must be turned direct to the south, or a little past the south, I should say, because they were on a curve. It starts on the curve right there; you go in on a slight curve. When the switch is properly set to conduct trains past it on the main line, then the switch point of the north rail of the "Y" track which lies between the two rails of the main track is moved away from the north rail so that the flanges go through. The point of the rail of the main track, which in this instance would be the south rail of the main track, would be snug against the
12 right hand rail of the "Y" track. In order to transfer a train from the main line to the "Y" track, the switch, the lever would be raised to the position I have stated and turned to the south. In doing that, this point on the left hand rail of the "Y" track, which lies between the rails of the main track, would go snugly against the north rail and there would be an opening in the south main rail, so that the flanges would go through the rails and follow the right hand rail of the "Y" or side track.

Exhibit "B" is a correct representation of this switch stand and the vicinity of it. Exhibit "B" does not show any target. With that exception Exhibit "B" is a correct representation of this switch stand as it was just before this wreck. I notice a track on which

there appears to be cars, some freight cars; it is what they have always called the dead track, or rip track, or something that way. It runs right along side of the main line. Between that track on which the cars are standing and the main track, which appears to be straight in this photograph, is the track they use to go down on the "Y" with; that is the track from which the engine went off. The cars standing on this track as shown in the photograph are close to where the engine turned over. I examined the lock on this switch stand within ten minutes after the accident. The lock was hanging in the eye; there was a chain attached to it. The coaches at that time were on the main track; what we call south of the switch point. The tender was off on what they call the "Y" track. There was no rails there; they had been displaced. Next to the tender was the baggage car; the back wheels of it were directly on the switch. The front wheels of it were across over the other side of the frog. Next to that was the smoking car. There were other cars; I didn't count them. The train was a passenger train. It made connections at Oelwein with other trains. As I understand it this train comes back as far as it goes, and some cars goes
13 on and some doesn't. They are divided there at Oelwein, as near as I understand that train. This lock was locked and unlocked with a key; that I saw there after the wreck. At or near the time of the accident, the employees of this road had keys to these locks on these switch stands—the trainmen, the switchmen, and the section men. The effect of the passing of an engine running rapidly as this engine was running, upon switch points that were not sufficiently opened to permit the flanges of the wheels to go between the points and the rails, would be naturally to break them off.

Cross-examination:

It was three years before this accident that I worked there at Oelwein. After that I had nothing to do with the yards except passing through and visiting there; passing through on a train as a passenger.

(On motion of defendant, the court struck out the testimony of the witness with respect to the employees having keys.)

The switch I have been speaking of was out very close to half a mile from the depot at Oelwein on the southwest main line, being the line passing through Waterloo and coming to Des Moines. That is the first switch you come to as you approach Oelwein. The "Y" at that switch leads in two different directions,—around to the main line going east; at that point where the switch is, there is the main track from the southwest leading into town, and then this "Y" leading off to the right. If you want to throw the switch for the "Y," you raise the lever pointed out in the photograph. In raising the lever you have to raise this weight that I spoke about, this square that sets down in there. It takes some strength to raise up on that lever. Raising the lever doesn't throw the switch.
14 To throw the switch from the main line over to the "Y," you unlock your lock, pull up your lever, raise it right up and

swing it around to the right, one quarter turn. You have to get it so the square comes out of the socket. When you get it high enough, then you pull it around. The switch was provided with targets. The object of the targets is so that you can tell whether you have a clear track or blocked. You have a flat piece to look either way if your target is all there. There is a lantern for night work; it has different colored glasses and these colors indicate whether the switch is open or closed. When I examined this switch stand, I found that the switch points were not thrown clear over either way. They were just the same as though the lever had been moved only part way around. They were neither against one rail nor the other, and the result would be that the flange of the trucks would go between.

Redirect examination:

Q. While you were working for this company in the shops there did you know who were supplied with the keys for these switches?

A. Yes, sir. I had them thrown for me several times.

Q. You may state to the court and jury what employees of this defendant road were supplied with keys to these locks on these switch stands for the different switches while you were there.

Objected to as immaterial, it appearing that Mr. Sheriff's work was nearly three years before this accident, and the conditions as they then existed would not be material and do not prove or tend to prove the conditions as they were at the time of the accident.

Objection overruled. Defendant excepts.

15 A. The trainmen and the switchmen, and the section men, and I also may say the hostlers that takes the engines out on the road and tries them, running from the back shop.

Recross-examination:

I say that the trainmen, switchmen and section men and hostlers that takes the engines from the back shops out, had keys when I worked there. The foreman of the section crew, I refer to as the section men. I don't refer to the whole section gang, but the foreman of the section crew.

Plaintiff offered in evidence the photographs, Exhibits "A," "B" and "C."

S. E. YOUNG, a witness for the plaintiff, testified:

I am forty-six, and live at Oelwein. My business is real estate and insurance. I have lived at Oelwein twenty-one years. I am familiar with the tracks of the Chicago Great Western Railroad Company in the vicinity of the first switch going into Oelwein from this direction. The photographs, Exhibits "A" and "B," now shown me, show generally the tracks in and about the switch stand, showing correctly the location of the switch stand and the tracks adjacent thereto.

I knew John J. Spellman during his lifetime. I remember about the time of his death. He received the injury causing his death in the yards of the Great Western at Oelwein. The engine lay just

a little east of the switch stand, where it went off the track. It was south of the main line, I should say a distance of about thirty feet. The engine was north of the track on which there appears to be cars standing, in the photograph, Exhibit "B." When I saw the engine, it was lying with the pilot north or northwest—lying
16 on its left side. The tender was right back of it, pointing to the northwest. I saw Mr. Spellman immediately after the accident. He was pinned under the engine. After they released Mr. Spellman and took him away on a stretcher, I went around in front of the engine on the north side of the train and went to the rear of the train, and the train had passed over this switch. After that I went west at the rear of the train, and then, after looking around there, I turned and went up town. The switch was on the south of the main line. I examined the switch to see what shape it was in. The handle that they used to turn the switch for what we call the high "Y" on the main line was, I should think, from six to eight inches above the socket, the fastening where they lock it, and to one side.

The photograph, Exhibit "C" is a correct photograph of a portion of the switch stand as I saw it. The lever that I refer to is shown in the photograph. When I first examined the lever, there was a padlock on the stand. It was in the little hole there, only the lock was hanging down in the eye. The lever was not in the position then that it is shown in the photograph. The eye was broken. It was cracked, but it was not spread a great deal. The opening in the eye was less than a quarter of an inch. The photograph shows the opening wider, it appears to me, than when I saw it. I think, there was a target on the switch stand. I looked at it with reference to the main line track, looking northeast or north. The target at that time was turned just a little, but what degree I could not say, but it was turned, but not enough to show that the switch was open. The sun was shining. I didn't observe any effect that the sun had upon the target in the position it was, looking straight up the track. At the time of the accident, I was in the smoking car. From my knowledge of speed, I would think the train was running probably in the neighborhood of twenty miles just before the accident happened. The first I noticed was
17 the applying of the brakes; there was a jar; that was not a great while before the train stopped. It stopped pretty sudden. After they applied the brakes it seemed to stop sudden. I could not say positively whether the opening in the eye was freshly done, but it was not a fresh break that day because it was what I would call rusty. I didn't observe very closely, although I did notice that the point where the opening was, was not very thick; that it had been worn.

Cross-examination:

I examined the target on the switch stand. It was quite a ways up, and then lamps on the top of it at night, and the target was below that. But as to telling the jury or anybody, I could not tell in just what position it stood, but it was standing just a little to one side,

you could see. That is, go down the track and look up the track a ways towards the target, it was just standing to one side a trifle. I think the target was below the light which I can see in one of these photographs. The target was a thin piece of iron. It was a round circle with a piece projecting out, like the rear end of an arrow. It set across the upper part of the switch stand like an arrow, something like a weather vane—the tail part of it. But there was a round circle and this here arrow part projected out from that. The target was about three feet long from one end to the other. Assuming that the target set with the main line unbroken, not knowing any more than I do about it, I suppose it would set crossways of the track, to show that the main line was all right; I don't know. What I say is that if the track was lined up for the main line, only the edge of the target would be visible; parallel to the line of the rail. If it was thrown round so that the tracks engaged the "Y", it would
18 stand across the tracks at right angles with the tracks. That is the way I think they are. I don't know enough about the switch to tell you just how they are. Going down the track a ways, about forty feet, after the wreck, the target was turned only partly. It was not turned at right angles across the track, and it was not parallel with the track. It was turned sort of quartering; I cannot describe the degree.

H. N. HANSEN, a witness on the part of the plaintiff, testified:

I am a lawyer connected with the firm of Clark, Byers & Hutchinson. I had the photographs, Exhibits "A," "B" and "C" taken. I was with the photographer when they were taken. They were taken about two weeks after the accident. In Exhibit "A" the camera was set from the switch about 200 feet or 175 or 180 feet southwest of the switch stand on the main line. In Exhibit "B" the camera was standing about 60 feet southwest of the switch stand on the main line. In Exhibit "C" the camera was standing within four or five feet of the switch stand, between the rails of the main line.

Mrs. FANNIE L. SPELLMAN, a witness on the part of the plaintiff, testified:

I am fifty-two years of age. I was John J. Spellman's wife; married thirty-five years ago. I knew him since I was fourteen years old. He had been in the employ of the Great Western between twenty-one and twenty-two years. At the time of his death, for his work as an engineer, he was averaging about 175 a month. We have three children; at the time of his death they were all married. I usually had his check and cashed it myself, just as the railroad company turned it to him. My father lived with us. I had a
19 sister and a niece besides my three daughters that my husband looked after. The youngest daughter was married at the time of Mr. Spellman's death and was supported by her husband. After the marriage of my children, the salary of my husband was given to my support. My mother depends on me.

Q. But she was not the dependent of your husband?

A. Well, when she depends on me she depends on my husband, doesn't she?

Q. Your mother lived with you?

A. Yes.

Q. And depended on you?

A. On me.

The age of Mr. Spellman at the time of his injury was sixty-one. He was never sick. Never ill during the time I knew him. He scarcely took a vacation; two weeks a year. I had no other source of income or support except his wages.

Cross-examination:

Mr. Spellman and I were the parents of three children—three girls; all married and away from home prior to his death. At the time of my husband's death, besides myself no one was living in the family but just my mother. The niece and sister I spoke of had been married and were not living with me. My sister had lived with me seven years, and my husband had raised a family of three daughters and a niece. The income which my husband obtained had supported all these people. The check which my husband turned over to me each month varied in amount, depending on the number of miles he had run, or the number of hours. After he went on this passenger run his wages were not so much as they were in freight service—$175.00 per month is the average. I remember receiving checks as small as $150.00. I received checks as large as $180.00 or $190.00. About four months in the year his insurance was taken from his check—eleven, sometimes. Before receiving the check, the insurance was taken out. The largest check I definitely remember within a year prior to his death was about $180.00. I certainly did not use that all for my own support; used it to maintain the family. At the time of his death, my mother was living with me and I supported her. She depended entirely on me for board and clothes. Whatever Mr. Spellman received for his own support and maintenance I paid him out of the money that I got, or he took it. He had no other source of income except his salary. His clothing came out of that and his expenses while on the road. He also spent money for tobacco; he smoked.

Redirect examination:

We had a home in South Des Moines in which we lived. Prior to his death, he sold that South Des Moines property. It had not all been paid for. He still held a mortgage and there was some balance due. The man who bought it was paying so much a year; I don't know that I could remember. We held a mortgage until it was fuily paid. The mother that I spoke of was my mother, not his mother.

Recross-examination:

The payments on the place had not yet been settled. The amount received yearly may have been $50.00 a month, I don't know as it would be. I got the money. We had only sold that property per-

haps a year before Mr. Spellman's death. There was no income from the property until after his death.

Plaintiff offered in evidence the Carlisle Mortality Tables showing the expectancy of life of a person 61 years of age to be
21 13.80 years; also the American Mortality Tables, showing the expectancy of life of a person 61 years of age to be 13.47 years.

It was conceded of record that L. W. Basham is the legally appointed, qualified, and acting administrator of the estate.

Plaintiff rests.

At the close of the plaintiff's evidence, the defendant moved the court to take the case from the jury and to direct them to return a verdict for the defendant for the following reasons and upon the following grounds, to wit:

1. The evidence fails to establish any negligence upon the part of the defendant.

2. The evidence fails to establish any negligence upon the part of the defendant which is the proximate cause of the derailment in which the plaintiff's decedent was injured.

3. The evidence fails to show that the misplaced or open switch which it is claimed caused the derailment of the engine which plaintiff's decedent was running, was left open by any employe of the defendant company, or that it was in the condition it was in through any fault or negligence on the part of the defendant or any of its agents or employes.

4. The cause of action presented by the plaintiff's petition as amended is barred by the statute of limitations.

5. It appears from the undisputed evidence that Mr. Spellman, plaintiff's decedent, died in March, 1910, and more than two years prior to the filing of the amendment to the petition, setting up the cause of action now set up by the petition as amended.

6. It appears from the undisputed evidence that Mr. Spellman survived the injuries which he received when the engine that he was driving was derailed, about 24 hours, and under the law as it then existed the right of action, if any, inured to him during
22 his lifetime and did not survive his death.

Which motion was by the court overruled, to which ruling defendant at the time duly excepted.

Defendant's Evidence.

PAUL B. VERMILLION, a witness on the part of the defendant, testified as follows:

I live in Kansas City, Missouri. In March, 1910, I had recently been appointed superintendent of the Chicago, Great Western Railroad at Oelwein, and had been there about two or three weeks. Oelwein is what they call the hub of the Great Western system. There are four or five different divisions all center there from different directions—from Chicago, Kansas City, St. Paul and Omaha. I was acquainted with John J. Spellman. I learned of the accident

to Mr. Spellman about the time it happened. When I first learned of it, I was standing on the station platform at Oelwein. I know the switch at which the derailment took place. It is the most southerly switch in the yards. It connected the "Y" track that runs from the southern division over to the main line division going to Chicago. The southern division is the line that runs from Oelwein to Kansas City, passing through Des Moines. The switch is perhaps half a mile from the depot. At the switch the track runs north and south, and about 50 feet to the east running north and south there is a street, and the track at this point is a perfect tangent, which is a straight track; and within about fifteen feet was a track running parallel to the main line that had the switch up on the "Y" track and run in a southerly direction along down the main line that Mr. Spellman came north on. We used that track as a storage track; this was a track branching off the "Y" track
23 and running parallel to the main line. There are no buildings around where the switch is; everything is clear there. It is out in the country from the city. I remember a train coming into Oelwein a short time before this accident. It was an extra train consisting of an engine and caboose. It came off the southern division. The division running from Des Moines to Oelwein. My recollection is, as to about the length of time before this accident happened, that the train pulled into Oelwein, would be fifteen or eighteen minutes. In coming into Oelwein, it would be required to pass over this same switch. Between the time this engine and caboose came over this switch until the passenger train that Mr. Spellman's engine was hauling, there were no trains over the line at this point to my knowledge. We had four switch engines in the yards at Oelwein. Oelwein is, as you might say, a clearing station for the whole system. We have large shops there, employing a thousand men approximately, and they repair all the engines that become in bad condition on the line, and it is practically the headquarters of the line outside of the offices of the general management. There were about 42 miles of switching tracks there; that is, 42 miles if laid in a straight line. Mainly, these tracks were in a northwesterly direction from the place of this accident. They would start at least half a mile away from the place this accident occurred. The switching by the employes was done mainly in the new and old yards which laid up parallel with the main line which runs between Chicago and St. Paul, and west from half a mile from the point of this accident to about two miles away. There were, of course, some few tracks, industry tracks there, that was used very seldom in that vicinity. When we come from the south up on the main line to the principal portion of the town, this "Y" track went around this way over to the Chicago division. About half way up on the "Y" track
24 was a switch that was used by the Standard Oil people as an unloading place. They got a car probably once a week or once in two weeks. Off the main line, a little above, there was another track we used for storing bad order cars. There were two tracks in there that branched off the main line about probably two or three hundred feet above the place where the accident hap-

pened, and followed the main line up to the station. We used them for bad order cars. The switch engine is handled by an engineer, fireman, foreman, and two assistant helpers; that is, three switchmen—one of whom is called the foreman and the others helpers: making five in all, constituting a switching crew for a switch engine. We had for each of these four engines a switching crew consisting of five men. On the date of the accident, none of these switching crews, to my knowledge, were doing any work in the vicinity of where the derailment took place. This "Y" track was a track that was used principally for turning passenger trains. For instance, a train would come in from the southern division that had to be reversed. We would take it around this "Y" and reverse it and put it back up to the station again. That was done once after the arrival of this train that was derailed, and once about midnight or along two or three o'clock in the morning, with some equipment off other trains that arrived during the night; and with the exception of this oil house switch, we hardly ever used that track. I might say that about twice a day was the only time it was used as a general proposition.

No. 4 is the train that Mr. Spellman met his death on. In turning this train, it would be backed down on the main Chicago line until you come to the switch leading into the "Y," then follow the "Y" over onto the main track of the southwest division, then it would come through this switch where the accident occurred and back to the station; and then it would be in proper position to return south again. The train on arriving from Des Moines would pull up to the passenger station and unload its baggage, express, mail and passengers, and the switch engine would then take hold of the train and reverse it. The train would use this switch where the accident occurred. It would run through there. When the cars come off the "Y," the switchman sets the switch so as to close the "Y," so that the cars would run in on the main line. In coming out off the "Y," the switch would necessarily be entirely open. When the cars got in on the main line of the Des Moines line and the switch was turned for the purpose of taking the cars up on the main line, if it was only partially turned so that the switch points were not lined up for the main line but only part way open, it would cause a derailment. In order that the cars would take the main line, the points must be properly closed against the stock rail.

When I heard of this accident, I immediately went down. I saw people running. I had been standing on the platform waiting for the arrival of the train. The train was a few minutes over due. I heard the train whistle in, and she had ample time to reach the station, so I immediately went down to see what was the matter. I walked or ran part of the way. From the time I saw the people running, I presume it must have taken me five or six minutes to get down there. I found that we had a very serious derailment. The engine was lying on its side and the tank was kind of buckled around. One mail car was thrown half way over. I think the baggage car was thrown the other way. My impression is that the

forward trucks of the smoker were off the track. I found Mr. Spellman had been injured. Before I got there he had been taken away. Nobody else was seriously injured. My first duty was to ascertain the cause of the derailment. I found that the engine had struck an open switch which had caused the derailment. I ascertained the position of the switch points. The switch
26 point on this side should have been right up close to what we call the stock rail, that is, the rail that goes along the side track. The other switch would have been a little ways from the other main rail on the other side. We generally use about four or five inches clearance between these stock rails and the point of the switch. The switch had been thrown around so that the wheels of the engine would strike between the two points. They would follow the rails down twelve or fourteen feet and then drop on to the ground because there would be nothing to hold them in position; and by striking these open points it caused the derailment. The switch stand was thrown at pretty nearly the danger position. I saw the lock hanging in the hasp. The little hole that the handle of the switch goes down over. The switch stand is set on what we call a head block, probably eighteen or twenty feet long. It is built up in most cases of a round frame—iron—this was a Ramapoo switch, and it comes up in the form of a bowl at the top of the stand, and the bowl is square. Then we use a plunger that is worked from a handle up and down to take and throw the switch, and this plunger is also square. It fits very snugly down on the bowl of this stand. When we push the handle down it fits down in the square bowl, and then we take and put the handle through a kind of little clasp that has a hole through to hold the lock. To throw the switch you have to unlock this lock and pull this handle up to unlock the switch and throw it to the other part of the square that is in the bowl, before you can put the handle down. You can't put the handle down unless this square plunger, which I should judge is three or four inches each way, each square is three or four inches, and you can't take and put that plunger down until it gets that square into the bowl. To move the switch, you have to raise the handle. When the switchman undertakes to move the switch, he pulls the lever up and reverses the switch and places it in a new position. He first raises it about a foot
27 probably. The next move is that he takes and reverses it, throws it around; then lets it down in another position. The effect of it is to move the rail. On this stand, rising above it, is a rod an inch and a half in diameter which runs up high, about twenty feet. On the top is a lamp and just immediately under the lamp, for daylight purposes, is a piece of steel, kind of arrow shape, about twelve, fourteen, or fifteen inches wide. It is painted red which is a signal of danger. When the switch is thrown to any other position except the main line, this target should be at danger. When the switch is set up for the main line, what we call the blade is set straight. You can't see it at a distance. It is, I suppose, quarter-inch iron, and looking right through it you can't see it; just see the edge of it. When it is set for the "Y," then it displays this blade of danger; right across the track.

This train was due at 2:30 in the afternoon. The 28th of March, 1910, was a clear March day; the sun was shining Exhibit 1, shown me, is the lock which I saw hanging there. These marks here on the ring were freshly made. There were marks on the rings of the lock, new. They were the same as now appears on the ring of the lock, except that they appeared fresh. I found a spike on the head block or large timber that supports the switch stand—a railroad spike; it is about five or six inches long; square; weighed, I should judge, about one-third of a pound; it is an inch square, practically; the edges are sharp.

Cross-examination:

The spike was brand new, without rust. When I first examined the switch stand after the derailment, the lever was in a cocked-up position. It was lifted up. It was raised at an angle of about thirty degrees above a straight horizontal position. You have to lift
28 it up, the square portion out of the bowl, before you can throw the switch. The rails are held in the position that the switch places them by reason of a socket, a square socket into which a square block fits; and in order to change the rails from one position to the other, this lever must be raised high to remove the block, and to do that the lever must be raised above the horizontal, straight position from the lock. When the lever is raised to that position, which releases the block from the socket, you can pull the lever on an axis to the right or the left. If the switch lever is stopped in its movement to the right or to the left at any point between the two points on its axis where the plunger drops into the socket, the rails are not in position either for the main track or for the side track. If the switch was open partly, the wheels would not touch the rails or switch points. The engine ran on the rails after splitting the points, going between the points she ran on the rails—both the east rail for the "Y" track and the main rail of the west side for a distance of probably ten or fifteen feet until the rails kept on spreading all the time until she dropped down, and there were indications of where she had run on the ties. The sharp ends of the switch points were not bruised or broken, to my recollection. Between the switch point and the station there are houses. To the left of the switch point, the houses are about a city block away; not very thickly settled—a few scattered around there. The particular engine in the yard that switched this train was what we called the east engine. The object pointed out in photograph, Exhibit "B," is storage cars. There are two or three storage tracks that we used to keep bad order cars on. These two storage tracks would hold probably thirty or forty cars apiece. The first of the tracks is shown in Exhibit "B" filled with cars. They were got onto the storage track, generally, by being shoved in from the north end. These storage tracks run up close to the station. The cars could be switched off from the
29 south or the north, but they were mostly pushed in from the north end because they were congregated up in the yard and shoved in there. They could be brought in from this "Y" track to where this switch was and brought down here and taken up to the

storage tracks. There were a lot of cars with draw bars out, and maintenance-of-way equipment stored in there consisting of steam shovels. All the switching, to my recollection, was done from the north end whenever it was necessary. But there was a switch at the south end which led to one of these storage tracks and a switch from one of the storage tracks to the other; opened off the "Y" track. There was a street along there to the right. The west side of the street would be probably 50 or 60 feet from the main line track. Four or five houses in the immediate vicinity; one was occupied because that was the house where they took Mr. Spellman. I should say that house was 100 or 150 feet cater-cornering away from the switch stand. At the time of the derailment there were cars standing on this blind switch track shown in Exhibit "B," the track was full of cars. No other obstruction between the houses on the east side of the street to the right of the cars that I can recall. The other regularly scheduled trains from the south over this switch where the train was derailed on the day the derailment took place, were:—the local due in there at five something P. M.; No. 60, the fast meat train from the southern division, due about three o'clock; No. 2, due there at that time, I think, about 1:45 A. M.—that is our fast train from Kansas City to Oelwein, passenger train; there was another freight train, No. 62, I think, that came along about three or four o'clock in the morning. This switch was the extreme southerly switch in the yards, and there was no occasion for switching over that track as a rule. I will venture to say that there was not a switch made on the south "Y" track once a week, with the exception of turning the passenger trains. The cars taken off for repair were put in from the north end and taken out of the north end. The east end engine had no occasion to do any switching whatever in the vicinity of this switch where the train was derailed. There was no other engine that did any switching down there to my knowledge, with the exception that I know they turned the passenger trains there, the east end engine was No. 434, Gibbons was a helper and Reese was the foreman. She was in use at night as well as in the daytime. She was the engine that worked that part of the yard as a general proposition. With the exception of the train, an extra, that arrived in Oelwein immediately before this passenger train arrived, I do not recollect, independent of the records, of any other extra arrival that day.

Q. Now, who had the keys to these locks?

Objected to as not proper cross examination.

The Court: Yes, I think he may answer that.

Defendant excepts.

Q. Sure.

A. The different switchmen that had occasion to open and handle switches.

Q. And who else besides the switchmen had keys?

Same objection. Overruled. Defendant excepts.

A. Engineers were supplied with them and the various trainmen.

Q. Trackmen were supplied with them?
A. Yes, sir.
Q. Switchmen, brakemen, and engineers?
A. Yes, sir.
Q. Firemen and the section men?
A. The section foreman.
Q. The section foreman?
A. Yes, he was the only man allowed a key.

Exhibit No. 1 is our standard lock. I should say the same
31 key would unlock all the switch locks; a standard lock and standard keys.

Redirect examination:

The main line track southwest of this switch is a straight line track for a distance of from twelve to fourteen hundred feet. Approaching Oelwein it is uphill, I should say about a three-quarter per cent grade. The switch where the accident occurred was within the yard limits at Oelwein; they extended about twenty-five or thirty car lengths beyond. Coming from Des Moines, this switch is the first switch off the main line. Having passed that switch, the next switch is probably 40 car lengths further up towards the passenger Station. When one stands at the switch looking towards these cars in the picture, the main line is to the left of the cars, or on this side. If one's eye could trace it, he could follow the main line right around on this side of those cars. In the photograph as you get up to the string of cars, you see a sharp turn; that is where the main line turns so that the track runs up this side of that string of cars. When you get a hundred feet beyond this switch, you come to another switch which leads onto a track upon which these cars are standing, that are pointed out to the left in the photograph. Then, a short distance beyond that on the "Y" track is another switch that leads back to this long storage track that the cars are standing on opposite the switch. That is the switch that leads onto this storage track where we see the cars in the picture, to the right of the main line. That track, in conjunction with the other track, was used for storage purposes; storing bad order cars and empty cars, going to the shops. On the south end of those tracks we had stored two or three old engines that had become obsolete. You get on this storage track to the left from the north from the switch leading from the main
32 lead; the track is practically all merged into one big lead. At the time the accident occurred, the switching was done, as a rule, at the north end, for this reason—at the south end there were several engines stored away in there, and they were in bad condition from age and decay, and some maintenance-of-way equipment that was not in good shape; and the switchmen generally did their work from the north end to avoid handling this junk at the south end.

MAURICE CASEY, a witness on the part of the defendant, testified: I live at Marshalltown and am section foreman in the employ of

the M. & St. L. In March, 1910, I was in the employ of the Chicago Great Western Railroad Company at Oelwein. I was section foreman. I knew Mr. Spellman during his lifetime. I was at Oelwein on the day when he was killed by the overturning of an engine. I was at the scene of the wreck. As section foreman I was entrusted with a key to the switch locks. On the day of the accident, I had no work in the vicinity of that switch, neither myself or my crew; we waren't up in the vicinity of the switch, and I had no occasion to lock or unlock it. I didn't unlock it or move the switch at all. I didn't lock or unlock the lock or have anything to do with the lock. On the day of the accident, I had a track walker; he went over the territory every day; over the yards. The track walker was a member of my gang and under my orders and supervision. His duty was to go over and inspect the tracks and see that everything was all right, and report if he did not find it so. The track walker went over this track every day. He would go over the main line track, southwest, about three-quarters of a mile from the depot; that would be about 300 feet beyond this switch to the yard limit point. On the date of the accident, the track walker who inspected or had orders to inspect this track was Frank Gerade.
33 He is an Italian-Girardi. He is here in attendance; that is he. He used to leave the tool house about one o'clock, and go southwest the first thing after dinner; he got down there probably about 1:30.

Cross-examination:

I had from thirty to one hundred men under me. Went on duty at seven o'clock in the morning; off at twelve for dinner; back to work at one o'clock; quit at six o'clock. At the time of the accident, we were working on the lead in front of the depot. I was repairing the track; had about thirty men; working there from seven until I heard that this train was derailed. I was not down to this switch before the derailment on that day. I went down after the derailment—probably half an hour. I went over the yard about twice a week myself, to examine the tracks. I had examined this switch probably three days before that. It is my recollection that I had not seen this switch for three days before the derailment.

Gerade went over the yards every day; that was his business. He walked. Went on duty at seven o'clock in the morning; went to dinner at twelve o'clock; returned at one. Gerade was the only inspector at that time.

FRANK GERADE, a witness on the part of the defendant, testified:

I live at Cedar Rapids. I work on the street car line. I formerly lived in Oelwein, working there for the Chicago, Great Western Railroad Company. Maurice Casey was my foreman. I was living in Oelwein and working for the Chicago, Great Western Railroad with Mr. Casey for my foreman in March, 1910. I was walk-
34 ing track under Mr. Casey's directions. In walking tracks I walked a track that comes down towards Des Moines on the

southwest division. When I walked that track I would go out as far as the yard limits. I remember the circumstances of Mr. Spellman, an engineer, being killed there in March, 1910. I was at the scene of the wreck. I know where the wreck occurred. On the day that Mr. Spellman was killed, I walked the track up there along where that track was. I observed the switch where the wreck occurred; that was before the accident. I walked south past the switch about 350 feet to the yard limits. When I got to the yard limits, I came back on the same line. Both times I walked on the main line. The track was lined up for the main line; lined up right for the main line. I observed the switch stand as I went by; the switch was all right, in the place it belonged. The switch was set for the main line. I walked along there about an hour before the accident occurred.

Cross-examination:

I am twenty-five years of age; born in Italy. I came to this country four and a half years ago. The accident occurred about three years ago. I had worked for the company fourteen or fifteen months before it occurred. I began walking track about nine or ten months before the accident. Went to work at seven o'clock; off at twelve; took one hour for dinner. I did nothing but walk the track. Walking along, I looked at the track—the ties and everything. I got my dinner at home and started to work at one o'clock. I then went to the southwest line. When I got to the switch stand, I stayed there a minute or two. I just looked at the switch stand and then walked on. I walked in the middle of the track between the rails. When I came down from the tool box, I walked down
35 the main line past this switch between the rails of the main line, down to 300 feet beyond this switch, and then I stepped outside of the north rail and walked back up the track. As I went down along the track I didn't go over to the switch. I looked at it twice. I noticed the switch points as I went down. I looked at the switch about half past one. I was not down in the vicinity of this switch again until after the accident. I saw the switch was all right. I was giving particular attention to see that the eye, the hasp through which this lock was, was all right. It was worn a little, but not through. It was not the way it is in photograph, Exhibit "B" before the accident. It was worn very thin but not through.

Redirect examination:

I went to the tool box at one o'clock; might be five minutes after one. Then I walked from the tool box up to where this switch is, that is three-quarters of a mile; that took me ten or twelve minutes, fifteen maybe; making it about twenty minutes past one when I passed the switch the first time, or twenty-five. Then I went to the end of the yard and back again. I looked at the switch when I went to the east. From the time I passed the switch and went down to the end of the yard and returned to the switch, it was five or six minutes; so that I estimate that when I last went by the switch it was half past one.

J. LINNEY, a witness called by the defendant, testified:

I live at Oelwein. I am a switchman in the employ of the Chicago, Great Western. I worked there about twelve years. I was working in the Oelwein yards in March, 1910, as a switchman. Knew Mr. Spellman; I recall the time he was killed. I
36 don't remember the date but remember the circumstance. I was working for the company on the 28th of March, the date it is conceded, he was killed. At that time the Great Western had four switching crews. A crew consists of a foreman, two helpers, an engineer, and a fireman. At that time I was foreman of one of the switching crews. I did my work in what they called the new yard, about a mile and a half from where this accident happened. We always called this switch the south line high switch. For some time I had not been near it. I don't suppose I had thrown that switch a half dozen times within a year previous to this man getting hurt there. I don't think, in all the years I had worked there previous to the time Mr. Spellman was hurt, that I had thrown this switch more than a dozen times. Neither I nor any member of my crew was down to that switch that day, or within a few days prior to that time.

Cross-examination:

I was with my crew all day. During the day we worked what we call the north yard, making and breaking up trains that come in there from the north and west; didn't go on this "Y" track.

Redirect examination:

I know Mr. Becker; he was living in Oelwein in March, 1910. He was foreman of one of the gangs. They put on an engine that day—what we call the fourth engine—and I believe he had that engine that very day for the first time. It was just put on now and then. He would take that fourth engine. I know Mr. Plashal. I believe he was running a crew in 1910; that is another crew; that is what we call the hill engine. I think he had the hill
37 engine that day. Mr. Gibbons was helping on what we call the lower end engine that did that passenger work; he was working on that crew. There weren't any more crews outside of those four. Gibbons didn't have charge of the engine on that day; he was a helper on the crew. There was a fellow by the name of Reese that had that crew that day. He was foreman. I was foreman of one of those crews, Mr. Becker of another, Mr. Plashal of the third, and Mr. Reese of the fourth. And of the crew of which Mr. Reese was foreman, Mr. Gibbons was a member.

C. G. BECKER, a witness on the part of the defendant, testified:

I live at Oelwein; have lived there for thirty-eight years. I am a switchman in the employ of the Chicago, Great Western at Oelwein. I have been in the employ of the Great Western as switchman at Oelwein, seven years last March. I remember the circumstance of Engineer Spellman being killed by the overturning of his engine.

He was coming in from the southwest. He was hauling passenger train No. 4. I was at the scene of the accident some time after it occurred—probably a couple of hours. I know where the accident occurred; near what we call the high "Y" switch on the southwest main line, or line leading to Des Moines. On the day of the accident, I was foreman of a switching gang. I was not a member of the gang that Mr. Linney was foreman of; that was another one. We had four gangs in all in the yards at Oelwein. Mr. Linney was foreman of one, I of another, Mr. Plashal of another, and Mr. Reese of the fourth. I know Mr. Gibbons. He was a switchman at that time. He was working with Mr. Reese. On the day of this accident, neither I nor any member of my crew went down to this high switch where the accident occurred, before the accident. On that day I had
38 no occasion to do any switching down there. Prior to this accident, within any reasonable length of time or within a few days, I had no occasion to do any switching down there. It was a place I never used. On the day of the accident neither I nor any member of my crew were down there at all. I note the cars on the photograph, Exhibit "B," now shown me. I notice a string of cars to the right in the picture. I recognize that storage track. It is a track going off the "Y." They kept bad order cars stored there. They had engines in there for a time, and gravel plows—these bulldozers as they call them—and side plows, and the likes of that. Such equipment is not frequently moved. It was put down there just for storage. I observe the other storage track leading off the "Y." At the time of the accident, I think there was a lot of Rogers' ballast cars in there; they weren't moved or switched about much. At that time the coaches of train No. 4 were turned at Oelwein and sent back down the line. When No. 4 pulled in from the southwest, they cut the engine off, and we used to go against it and go across and turn around the "Y," head right straight out on the ice house track over the Rock Island crossing, and then shove them down this high line, shove over the southwest main line switch, the high line switch, and then right back up the main line and pull them back up the line, and then the engine would cut off and go back around the "Y." That would turn the cars right around. In making the movement, this passenger train would pass over this high switch twice—once out over the main line, and once going up the main line. The gang that made these movements was Mr. Reese's gang. Up to within a few days before that I had been helping Mr. Reese on his crew, until they put on the fourth engine. I took the fourth engine, but before that had been a member of Mr. Reese's crew. Aside from the move-
ments in switching this train, I remember one occasion when
39 we used this high switch three or four days before the accident. That is the only occasion of which I now have any recollection of using it, except in the movement of this passenger train. The last time that this passenger movement took place before the accident, must have been the day before, because it was this particular train. On the day of the accident neither I nor any member of my crew was down at that switch, nor over it, nor around it anywhere. Neither I nor any member of my gang moved the switch on that day. We were not down there at all.

Cross-examination:

I was a member of Mr. Reese's crew up to within three or four days before the accident. I think I had worked with Mr. Reese right close to a year before that. During that year we were what was called the lower end crew; worked all the passengers. The only time we ever used the high switch was going around the "Y" with this engine; did that once a day. The train was due at 2:30 in the afternoon. We figured on being around there to turn that train. When I was working with Mr. Reese, we hardly ever went down on that track running parallel with the main track. This side track shown in Exhibit "B" upon which the cars are standing, was full of cars most of the time. There were times when I was working with crews whose field was down in the vicinity of this switch that I had to couple onto the cars at the north end of this blind switch and pull them out and switch other cars in there. Maybe there would be for weeks that we were not down there at all. I don't remember or recall the time I worked with Reese that we ever did it. While I was on the shop engine, I went down there after night for cars. Some-
40 times they would let those cars stand down there for months—a whole track full of cars—and not touch them.

Redirect examination:

The night crew went to work at seven o'clock and went off at seven in the morning. The foreman of the crew, at the time of the accident was Mr. Swem. He is dead. Most of the shop cars, as they called them, were stored in the new yard. A great deal of the work of this crew was bringing bad order cars from the new yard. In getting bad order cars, this night crew would not, of necessity, have to get them off of either of the storage tracks shown in Exhibit "B." There were other places where they stored more cars than they did there.

JOHN PLASHAL, a witness on the part of the defendant, testified: I live at Oelwein. My business is switchman in the employ of the Great Western Railroad. I have been a switchman there for about seven years and a half. In 1910, I had charge, as foreman, of one of the switching crews. The other foremen were Jack Linney, Chris Becker, and Art Reese. I know Gibbons; he was a member of the crew that Reese was foreman of at that time. I remember the circumstance of Mr. Spellman being killed in March, 1910. The wreck occurred at the high switch, south of Oelwein, on the southwest division or the line coming to Des Moines. It occurred about two o'clock or something along there in the afternoon. During the day that the accident occurred, neither I nor any member of my switching crew was down at this high switch where the accident occurred until after the accident. We did no work there; had
41 no occasion to use the switch and didn't use it or move it. I never go down to that switch; I am assigned to the hill engine; I am always on the hill work. The hill is in the middle of the new yard and the old yard. At the time of Mr. Spellman's death, I had no occasion to, and did not, at any time go down there.

Cross-examination:

The work of my switching crew was in the day time, and was all done in the new and old yards. The new yard was a half a mile north of the switch where Mr. Spellman's injury occurred. I have taken oil down there to the Standard Oil Company. Never took bad order cars down there. I was there always with my crew.

A. C. STEVENS, a witness called for the defendant, testified:

I live in Des Moines and am train dispatcher for the Chicago, Great Western Railroad. In 1910, I was chief dispatcher for the same company, located in Des Moines. As such chief dispatcher, my duties extended over the line from Oelwein to Kansas City—what is sometimes called the south western division. My duties as such dispatcher were the supervision of all the men in the office—train dispatchers and operators who were handling all trains through the train dispatcher. We ordered these trains from the terminals, and when they reported to leave the terminal, the train dispatcher had charge of them; watching the trains to see that they were moving properly. At my office in Des Moines, I would know where every train was running; know within a very few minutes, or within one station where all the trains are. A train dispatcher has them in mind because it is necessary to do that in order to keep the
42 line up and to know what his trains are doing. I was on duty as chief dispatcher on the 28th day of March, 1910. I knew Engineer Spellman during his lifetime. I remember the circumstance of him being killed at Oelwein on the 28th of March, 1910. He was hauling train No. 4 from Des Moines to Oelwein. The train came from Kansas City; the crew changed at Des Moines. His engine took the train at Des Moines and would haul it as far as Oelwein. It was due at Oelwein at 2:30 in the afternoon. There was one other train on the line between Des Moines and Oelwein besides this train; a train ahead of it. It was a freight train; left here about midnight the night before. No. 4 left the next morning. The engine of the train that was ahead of No. 4, went in ahead of No. 4 into Oelwein; it was about fifteen or twenty minutes ahead of No. 4. Their engine was out of coal and they were getting onto their sixteen hours which we have to avoid violating,—the sixteen-hour law—and the train was set out at Hudson, and the engine was cut off and run in light from Hudson to Oelwein. Hudson is the second station this side of Waterloo; about thirty miles this side of Oelwein. We keep a record, what we call a train sheet; it shows the movement of every train, the number of every train, the conductor's name, the engineer's name, the number of the engine, and the number of cars in the train, the time they leave the terminal, and the time they leave every station until they reach the next terminal. It shows dates. The train sheet is supposed to begin at midnight every day. We have a new one for every day. Exhibit No. 2 is the train sheets for March, 1910, for the district between Des Moines and Oelwein, known as the 4th and 5th district, from Des Moines to Oelwein. The sheets marked Exhibits 2½ and 2¾

in Exhibit No. 2, show the movement of trains at all stations. They show the time of arrival and departure at all stations where there is an operator on duty during the day. Sheet, Exhibit No.
43 2¾, shows the movement of trains on the 27th; sheet, Exhibit No. 2½, shows the movement of trains on March 28th. The movements of train No. 4 appear on the sheet; it is found in the first column at the right,—Conductor Fagg, Engineer Spellman, Engine 170. It shows that this train left Des Moines at 9:15 in the morning; left Fairbank at 2:18 in the afternoon. Fairbank is the first station west of Oelwein; that is the last station before you get to Oelwein. It left there at 2:18, which is virtually on time. They were due to leave at 2:15; it was about two minutes late or something like that. The freight train appears on the sheet of March 27, 1910, leaving South Des Moines, which is our freight terminal. They left South Des Moines at 11:30 P. M., the night of March 27th. It shows the movements of that train until its arrival at Oelwein, at every station where there was a night operator. The train arrived at Hicks, that is the first station east of Reinbeck, at seven o'clock in the morning. They left there at 9:20. They got into Hudson at 9:30; that is the station I spoke of, where the train was set out. They left Hudson at 12:23; that is, the engine did; 12:23 in the afternoon. Tracing the movements of the train until it reached Oelwein; it left Waterloo at 1:07 P. M.—that is West Waterloo; DeWar at 1:27; Dunkerton at 1:36; Fairbank, 1:52; and arrived at Oelwein at 2:15 P. M., on the 28th—that was just fifteen minutes before No. 4 was due. I know these records are correct; they were made under my personal supervision.

(Exhibit No. 2 offered in evidence by the defendant.)

There was no train into Oelwein between the time when this engine got there at 2:15 and the time of the arrival at 2:30 of No. 4. There was no train out of Oelwein that afternoon between twelve o'clock and 3:30; that is, I mean on this line coming south to Des Moines.

44 Cross-examination:

My office takes no account of the movements of switch engines in the yards. I have no record of the movements of switch engines in the yards at Oelwein at any time.

GEORGE D. GIBBONS, a witness on the part of the defendant, testified:

I live at Oelwein and am a switchman for the Great Western. In the employ of the Great Western as a switchman four years on the 19th of March next. I remember Mr. Spellman during his lifetime; and remember the circumstance of his death—it was due to a derailment of his engine in the Oelwein yards. That day I was switching in the yards, working on the lower end engine, what we call the lower end. Art Reese was foreman. There were four engines working at that time—Mr. Becker had one; Mr. Plashal, another; Linney, another; and Mr. Reese, the fourth. I was a member of Mr.

Reese's crew. Our engine had the passenger work to handle. We had to switch all the passenger trains during the day and unload stock and do local work. I know where the switch is where Mr. Spellman's train was derailed. It is off the southwest main line. It is connected with a high "Y" that they use for turning passenger trains on, and is connected with what we call the ice house track. I could not state the exact distance the switch is from the yard limits on the line coming to Des Moines on the southwest division—quite a little ways. It is the last switch; no other beyond that.

Q. When before Mr. Spellman's death or the accident that resulted in his death, were you or any member of your crew over that switch?

A. We had been over the day before in the afternoon.

45 Q. What were you doing?

A. Turning the passenger train from the southwest.

Q. Turning this same passenger train, No. 4?

A. Yes, sir.

Q. How did you turn it?

A. When it would pull in off the southwest main line it pulled in on passenger five. We headed in against it with the engine, come out the ice house track and shoved down the high "Y" and pulled it in on passenger six.

Q. You would go in on the "Y," where?

A. At the top end of the ice house.

Q. Then you would come over the "Y"?

A. Yes, sir.

Q. To this particular switch?

A. Yes, sir; shove down to that switch, and then come back up the southwest main line with the train.

Q. Pass over this switch then how many times in making that movement?

A. Twice,—going out and coming back.

Q. Going out on the main line and coming in on the main line?

A. Yes, sir.

That was the last time either I or my crew used that switch prior to the accident. I was at the scene of the accident shortly after it occurred. I paid no particular attention to the condition of the switch when I was there. We took the relief car down and I was attending to transferring the passengers. I did not leave that switch open, nor did any member of our crew leave that switch open. The day Mr. Spellman was killed, I was with the crew all day. On that day neither I nor my crew was over this switch; had not been over it that day.

46 Cross-examination:

It will be four years on the 19th of next March, when I went to work there; so it must have been in 1910. I had been working only nine days previous to this injury.

WALTER HENRY POWELL, a witness called on the part of the defendant, testified:

I live in Des Moines. I am a locomotive fireman in the employ of the Chicago, Great Western Railroad; have been so employed for seven years and two months. I knew John J. Spellman during his lifetime. I remember the circumstance of his death. I remember about when it was. It occurred on the 28th day of March, 1910. I was working on an engine between South Des Moines and Oelwein; firing on an engine going east from Des Moines to Oelwein. We were hauling a freight train. We left Des Moines just before midnight on the 27th of March, and worked east from South Des Moines to Oelwein. We went into Oelwein with a light engine. We had left the train at Hudson, thirty miles this side of Oelwein. We did that because our time was getting too short to get in inside of the sixteen hours. I know where Mr. Spellman was killed—where the wreck occurred. It was what was known as the "Y" switch, about a quarter of a mile west of the passenger depot, I should judge. It is the first switch you come to going into Oelwein from the south or southwest from Des Moines. We were ahead of No. 4. In going into Oelwein I was on the left seat box, on the left side of the engine on the seat box. I was sitting up there looking ahead. As we were going into Oelwein, this high switch where the accident occurred was set for the main line. We went over the switch all right and noticed nothing particular about it. My
47 recollection of the time we went in there was about fifteen minutes ahead of No. 4.

Cross-examination:

I went on duty at 11:15 at Des Moines. At 4:15 of the afternoon of the following day the sixteen hours would be up. Our train had reached Hudson. It was a freight train. What we call through freight. I do not recollect the exact time that we arrived at Hudson. It was around noon or a little after. Oelwein is thirty miles from Hudson. When we went by the switch, this high switch, I was sitting on the seat box at the left side of the engine. We look at all the switches before passing over them. There was nothing about this switch that attracted my attention one way or the other.

Redirect examination:

I learned of Mr. Spellman's death shortly after it occurred. I stopped at Oelwein; that was the end of the run.

Q. When you were coming into Oelwein, I don't think I asked you whether you, after you had passed this switch, you came in on the main line or how you came in? I think you said the switch was lined up for the main line, but how did you come into the station, over what line?

A. Over the southwest division.

Q. Over the main line?

A. Yes, over the main line, right into the yards, right into the depot.

Q. Now, did you stop at the switch at all or did you run right over the switch on the main line right into the city?

A. We ran right into the city over the main line. Didn't stop at all.

48 Recross-examination:

Q. How fast were you going?

A. About ten miles an hour.

We had an engine and tender only.

E. H. FAGG, a witness on the part of the defendant, testified:

I live in Des Moines. I am a passenger conductor on the Chicago, Great Western Railroad; in the passenger service about fourteen years. I knew Mr. Spellman during his lifetime. I was the conductor on Train No. 4, that Mr. Spellman was pulling on the 28th of March, at the time of the wreck at Oelwein, in which he was killed. I was in the rear car of the train, in the parlor car, as we approached the scene of the accident. When the accident occurred, I got off and went immediately to the engine, saw the conditions there and assisted in getting Mr. Spellman out from under the wreckage. We took him over to a house just opposite the track there, not quite half a block. After that, I went back to the scene of the wreck. I made an examination of the switch which was the cause of the derailment, and I noticed that the switch handle was raised up out of the socket on the switch stand and turned part way around. The switch point stood away from the stock rail about half way. That would leave an opening between each switch point and the stock rail on each side. The stock rail is the solid rail that goes up the main line on the left hand side and the "Y" on the right hand side, as you are approaching the switch; the part of the track that is not movable. The points are movable. The points were standing away about an inch or so from the stock rail, leaving an opening there where the flange would go between; the wheel would run on the rail up until the track separated

49 far enough to let the wheels drop between the rails. I examined the tracks there; it showed the marks of the wheels after they left the points of the rails of the switch. Exhibit No. 3 is a diagram which represents correctly the track in different positions as it was there at the switch stand immediately prior to this wreck. The middle track would represent the switch lined up for the "Y" properly; it would be No. 2. No. 3 would represent the switch as it was when the derailment took place. Track No. 1, the switch point on the right hand here sets up against this stock rail close, and there is an opening here that will line your train up with this main line going up this track here. As the train moves up to the switch, the flanges of the wheels holds the wheels on the track. When the switch is properly lined up for the main line, the way the engine was moving, the flange would follow on the left hand side. At No. 3 you will notice an opening between these points and the stock rail, a small opening in there, perhaps an inch and a half or two inches between each point, and the points don't set up against

either stock rail, leaving an opening where the wheels would follow down until the track became so wide they would run on these two outside rails, the wheels would, until the gauge became so wide that the wheels whould drop down in between the rails; I should judge it would be about twelve or fifteen feet. I have been in the railway service twenty-five years last March. To have the switch points in the position I speak of, the switchstand would stand at an angle of about forty-five degrees—that is, the target would stand at an angle of about forty-five degrees, I should judge. When the switch is lined up for the main line, the handle is down and locked in a hasp, and there is a square plunger on the stand that when you raise this handle up, this plunger comes out of the cylinder. The plunger sets into a square cylinder,—that is, the inside of it is square,—
and the plunger is a square block. When you raise the
50 handle up, you raise the plunger out of the cylinder. You have to pull it clear around in order to throw it to the side track or "Y"—clear around to get the square, in order to put it down in, that plunger, it has to go a quarter of the way around. That is, your handle goes a quarter of the way around. If it is only moved part way around so that the plunger doesn't go down into the socket, the tracks will be open. No. 3 of the diagram shows the condition the different tracks would necessarily be in with the plunger not down in place. Basing my answer on my experience as a railroad man, in operating trains, an engine or car could not stay on the track with the switch or tracks in the condition that they were in when I saw them running over the switch going towards the point of the switch; it would necessarily result in a derailment, that condition would; going east there or north, whichever you call it, going towards the point of the switch.

Cross-examination:

I didn't see the condition of the switch until after the wreck. The train was running, as we approached the switch that day, about twenty miles an hour. The engine was laid over on its right side. The tender was kind of buckled up against the boiler head of the engine. The tank was off the track too. The ties were torn up some. We had either five or six passenger cars. The engine was not one of our large engines; it was what we call the 170 class. The switch points were not disturbed; not torn loose. This train in running through the switch, as far as it did run through, would have no tendency to change the situation of these switch points to what they were before the engine touched them, for the simple fact that when the wreck occurred it moved forward all the time until it stopped. The flanges of the wheels, the way those switch
points stood, did not strike the points at all. The flanges are
51 on the inside of the wheels of the cars and engine. There is some little play; they are not right up absolutely tight. There is very little play if the track is in proper condition. When a train passes these switches, when the switch stand is in proper position, there is no oscillation or movement of the switch stand. If the tracks were set for the "Y," the target would show a flat side

to the main line. If set for the main track, the target would be parallel with the track, that is, would be parallel with the rails of the main track. If set for the side track, the target would be turned right across the track. If set for neither it would be at some point between a point parallel with the track and at right angles across the track, depending on the exact position of the lever.

Redirect examination:

My estimation of twenty miles an hour, is the rate of speed about the time the engine struck the switch.

WALTER H. POWELL, recalled, testified:

At the time we came in over this switch on the day Mr. Spellman was killed, there was not any switch engine or crew out in that vicinity or any place around there; I didn't see any.

Cross-examination:

Q. You were not looking for any were you?
A. Yes, sir.
Q. What? Looking for them?
A. Yes, sir.
We looked to see that the track we were going to use is clear.

52 Redirect examination:

The train I was on was a third-class train. In coming into the yards, it is our duty to watch out, because the switch engine has the same right in the yards that we have.

Recross-examination:

I didn't see any switch engine on the main line, nor close to it.

(Defendant offered in evidence the diagram, Exhibit 3.)

EARL F. HATFIELD, a witness on the part of the defendant, testified:

I live in Austin, Texas. In March, 1910, I was living in Des Moines; engaged as a locomotive fireman. I am now a locomotive engineer on the Houston & Texas Central. I knew Mr. Spellman in his lifetime. I was on the engine that was derailed going to Oelwein on the 28th day of March, on which Mr. Spellman was killed. I was firing the engine. The switch was known as the west "Y" switch; that was where the accident occurred. The track for some distance southwest of that switch is a straight track; at least one-half mile. Going into Oelwein, on that occasion, I placed in a fire and then climbed on the seat box; was about a quarter of a mile from the switch when I got on the seat box. I was on the left side, going east. Mr. Spellman was on his seat box on the right side; as we approached the switch, he was looking ahead. When I first got onto the box, I glanced across the curve looking for any trains that might obstruct the main line. Shortly after that, I looked along the line of the track. I glanced up the track ahead of us and noticed

the switch stand was wrong, or the target was against us.
53 Then I spoke to the engineer that the switch was wrong. He took a good look for himself and then applied the air. I looked at the rail. The rail was what I took to be half and half. The switch was lined up for neither one track nor the other.

Cross-examination:

I looked at the target from my side. It was far enough around so that I could see the outline of all of it. When the target at the switch stand is set for the main line and in proper position, the target will point parallel with both rails of the track. And when set for the "Y", it would point straight across the rails. It was not pointing in either direction. I would be unable to state at just what angle it was, but it was far enough around so that I could see all of it. I was looking out of my front window. Mr. Spellman was on the other side of the engine cab and looking out of his front window. Between these windows there is some eight feet. The width of the window through which I looked is twelve or fourteen inches, and his window is the same. The engine was about 200 feet away from the switch when I discovered that it was wrong. We were running at about twenty-five miles an hour. The window out of which I looked was about eighteen inches below the top of the boiler. The target on the switch stand is about twelve or fifteen feet up. The height of the engine seat where I was sitting is about eight feet. After I had a general view of the situation across the curve, I began looking along the track towards the switch. Above this switch, between the switch and the depott in Oelwein, there is a curve on the main line—about 100 feet; it curves to the north or east. Exhibit "B" represents the surroundings as they were just before the accident.

54 J. L. ERVIN, a witness on the part of the defendant, testified:

I live at Oelwein. I am special agent for the Chicago, Great Western Railroad. In March, 1910, I was living at Oelwein. I recall the circumstance of Mr. Spellman's death on the 28th of March, 1910. I was at the scene of the accident a few minutes after it occurred. I examined the switch stand. I noticed the padlock hanging on the switch stand, unlocked. I think there was a spike laid there—a common railway spike. I took charge of the lock. I examined the lock carefully. Exhibit No. 1 is the lock that I took from the switch stand. There are the marks where it has been hammered. I noticed those marks at the time I took the lock. The marks were the same as they are now, but of course, they might be older, show age more. They appeared fresh marks then. The lock was hanging in the switch stand unlocked, and out of the hasp. The ring of the lock hung down; it was hanging loose, that is fastened by the end of the chain to the switch stand. The lock can be unlocked without a key.

Cross-examination:

I am special agent; my work is detective work—along that line. When I got down there it was about twenty minutes after the wreck, as near as I can remember. I went down in an automobile. When I got down there to the switch stand, Mr. Vermillion and Mr. Fagg, I believe, were there. They were looking over the switch stand and lock to find out what had caused the accident. I made a careful inspection of the hasp or ring through which the ring part of the lock was placed when the switch was locked. The hasp was somewhat worn. I said the lock could be opened in another way; it could
55 be jerked open with a chain; I think it could. I don't recall seeing the men do that way, but I could do it that way. I have seen it done. I have unlocked that one; did it shortly after the accident. In opening this lock with a chain, I don't think I experimented with any other lock.

Redirect examination:

I say that by putting this ring through something solid the lock can be jerked open, and that I did that.

Recross-examination:

This lock on this switch stand, the day this wreck occurred, was in such condition that when placed in the hasp and locked, by pulling on the chain you could unlock it. Cannot tell how long it had been in that condition. Don't know how long it had been there.

(Defendant offered in evidence Exhibit No. 1.)

Earl F. Hatfield, recalled, testified:

Mr. Spellman was looking out of the window ahead when I called his attention to the fact that the target was wrong. He was sitting on his seat box. He looked out of the side window; stuck his head out of the side window and looked ahead. He was still seated.

(Plaintiff offered in evidence the spike, Exhibit "D.")

Mrs. Fannie L. Spellman, recalled by the plaintiff, testified:

I know the signatures attached to the first page of Exhibit
56 "F," of my daughters Merel Spellman Heathershaw, Fannie Spellman Stevenson, and Ruth Spellman Elder; there are no other children surviving Mr. Spellman. Exhibit "F" was executed and signed immediately after Mr. Spellman's death.

L. W. Basham, a witness on the part of the plaintiff, testified:

I am the acting and appointed administrator of this estate. I was present when the paper, Exhibit "F" was executed on the 13th or 14th of April, 1900. I acknowledged the signatures of the signers on that date—two on the 13th and the other on the 14th.

Plaintiff offered in evidence the paper, Exhibit "F," to which defendant objected for the reason that the same is irrelevant and immaterial purporting to be an assignment of the interests of the heirs in certain specified property of the estate of John J. Spellman, de-

ceased, and does not purport to be an assignment of any part of the action or right of action which the plaintiff is now prosecuting for Mrs. John J. Spellman.

Objection overruled. Defendant excepts.

Plaintiff offered in evidence the return of the sheriff on the original notice in this case, so as to fix the date of service with respect to the date of the assignment.

E. H. Fagg, recalled by the defendant, testified:

No. 1 of Exhibit 3, is drawn to represent the tracks as they would be if the switch was lined up for the main line. The switch point would be absolutely up tight against the stock rail leading to the "Y," when set for the main line; that is the right hand rail.

57 When set for the "Y," as I have illustrated here in 2, the switch point would be against the left hand stock rail in the same position as it was over there only on the opposite rail. No. 3 illustrates the position as it would be if only partially thrown. At the top of the diagram there is a frog leading from one track to the other, and the guard rail to keep the flanges lined up so that they will follow this frog. The frog is to lead from one track across the other. It is a crossing. The switch points run down to a thickness of less than 1-16 part of an inch on most of them at the extreme point. You would have to go back from the point about two feet before the switch point is an inch wide on top. You would have to go seven or eight feet before it got full width. But right at the point, they are only 1-16 of an inch.

Cross-examination:

At the time of the wreck I examined the switch points. I made a memorandum that the switch points were O. K. outside of being away from the stock rails.

Both parties rest.

Evidence Closed.

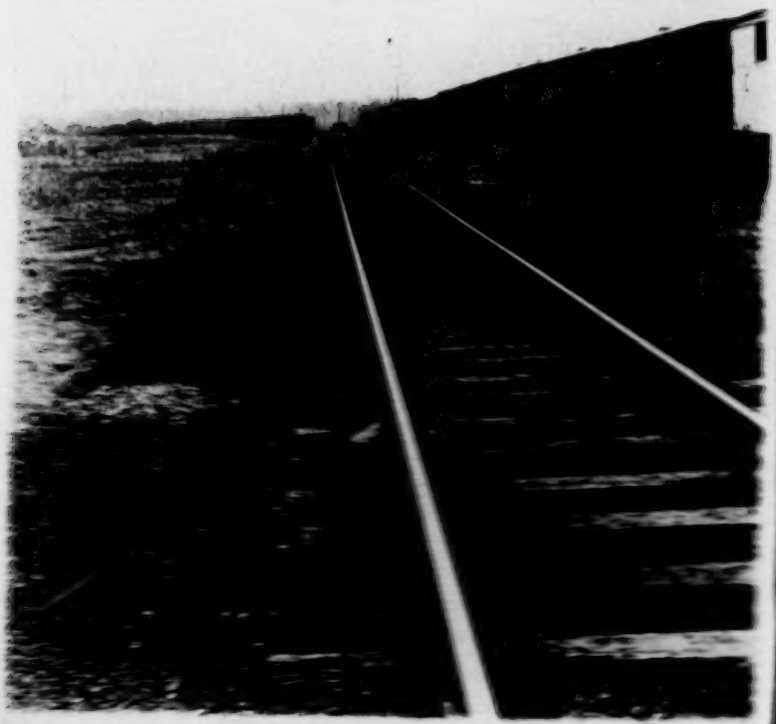
(Here follow photographs marked pages 59, 61 and 63.)

58 EXHIBIT A.

Plaintiff's Exhibit "A," is the photograph inserted opposite this page.

a/

Jno Ewell



60 EXHIBIT B.

Plaintiff's Exhibit "B," is the photograph inserted opposite this page.

62 EXHIBIT C.

Plaintiff's Exhibit "C," is the photograph inserted opposite this page.

64 EXHIBIT 1.

Defendant's Exhibit No. 1 is a padlock of the kind and character of the one described in the testimony of the witnesses and shown in Exhibit "C."

EXHIBIT D.

Plaintiff's Exhibit "D," is an ordinary railroad spike as described in the testimony.

EXHIBIT 2.

Defendant's Exhibit #2 is the train sheets identified by the Chief Dispatcher, showing the movements of trains over the defendant's line between South Des Moines and Oelwein, during the month of March, 1910. The sheets marked by reporter "2½" and "2¾" show as follows: 2½ shows the movements of trains on Mar. 28th, between th- points stated, and 2¾ shows the movements of trains on the 27th between said points.

Said sheets show the movements of train #4, being the train hauled by Engineer Spellman which was derailed at the high switch entering Oelwein; they show said train left Des Moines at 9:15 A. M., and Fairbanks, the first station west of Oelwein, at 2:18 in the afternoon. Said sheets also show a freight train leaving Des Moines at 11:30 P. M. the night of Mar. 27th; leaving Fairbanks at 1:52 and arriving at Oelwein at 2:15 P. M., on Mar. 28th, 15 minutes before #4 was due to arrive. They show that there was no other train into Oelwein from the west between the time the freight engine arrived at 2:15 and the time of #4; also that there was no train out of Oelwein on the afternoon of Mar. 28th, toward Des Moines, between 12 M., and 3:30 P. M.

EXHIBIT 3.

Defendant's Exhibit #3 is the diagram inserted opposite this page.

(Here follows diagram marked page 65.)

66 EXHIBIT F.

Plaintiff's Exhibit "F" is an instrument executed on April 13th. 1910, and acknowledged April 14th, 1910, by Merel Spellman Heathershaw, Fannie Spellman Stevenson and Ruth Spellman Elder, daughters and only children of John J. Spellman, conveying to Fannie L. Spellman all their interest in and to the estate of said John J. Spellman, including, among other things, their right as heirs or distributees or claimants in and to the amount due the estate of said John J. Spellman from the Chicago, Great Western Railway Company on account of the wrongful death of said John J. Spellman.

The foregoing is all the evidence offered and is all the evidence introduced upon the trial of this case; and the same was taken down in shorthand by the official shorthand reporter, and at the close of the trial, the official shorthand report of the trial was duly certified in the manner required by law by the official reporter, Gordon Elliott, and by the Hon. C. A. Dudley, presiding judge; and on the 31st day of October 1913, and at the close of the trial, the said official shorthand report of the trial, together with the certificates of said reporter and the said judge thereto attached, was filed by clerk of said court and duly made of record accordingly. And thereafter said official shorthand reporter made a transcript of his official shorthand report of the trial, which was duly certified by him as a full, true, correct and complete translation of his official shorthand notes of the trial, now on file with the clerk of the District Court of Polk County, Iowa, as a part of the record in said case.

67 *Motion to Direct a Verdict.*

At the close of all the testimony, both parties having rested, defendant moved the court to direct the jury to return a verdict for the defendant for the following reasons.

1. The evidence fails to show that the defendant was guilty of the negligence charged in the petition.

2. The evidence fails to show that the derailment which resulted in the death of Mr. Spellman was the result of any fault or negligence on the part of the defendant.

3. The evidence affirmatively shows, without conflict, that the displaced switch which caused the derailment of the engine, resulting in the death of Mr. Spellman, was not displaced or opened, or permitted to be open, by the act of any person in the employ of the defendant company, or of any officer, agent, or employee of defendant company; and that said open switch was not due to any negligence on the part of the defendant or of any of its officers, agents or employees.

4. The evidence conclusively shows that from the time the evidence shows without dispute the said switch was properly lined up for the main track and closed, until the time of the derailment, no

person in the employ of the defendant used, or had occasion to use, the said switch in the discharge of any duty devolving upon him, and that the same was not opened by any such employee.

5. The cause of action set up in plaintiff's petition, as amended, is barred by the statute of limitations.

6. The cause of action set up in plaintiff's petition did not survive the death of the said John J. Spellman.

Said Motion to Direct Verdict was by the court overruled, to which ruling defendant at the time duly excepted.

At the close of all the evidence and before argument to the jury, the defendant requested the court to submit to the jury the
68 following special interrogatory, and at the same time served upon counsel for plaintiff a copy thereof:

Was the open switch which caused the derailment of the engine which Mr. Spellman was driving opened by any officer, agent or employe of the defendant?

After the evidence was concluded and before arguments of counsel to the jury, the defendant asked the court to give each of the following instructions to the jury:

Instructions Asked by Defendant.

1. Under the undisputed evidence, the plaintiff is not entitled to recover, and your verdict will be for the defendant.

2. The court instructs you that the cause of action set up by the plaintiff in his petition as amended is barred by the statute of limitations, and your verdict must therefore be for the defendant.

3. The court instructs you that plaintiff's decedent, John J. Spellman, was guilty of negligence contributing to the injuries which he received causing his death. If you find for the plaintiff, you will reduce the damages which you find plaintiff would otherwise be entitled to recover in accordance with the rule elsewhere given you in these instructions.

4. The court instructs you that there can be no recovery in this case for money which Mr. Spellman would have used for his own support; nor can there be any recovery for money which you find there was a reasonable expectancy he would have earned but which would not have been used by Mrs. Spellman for her own support or that of her children. There can be no recovery on account of money which you find Mr. Spellman would have earned but which was used by Mrs. Spellman in the support of her mother or other relatives who were not related to Spellman.

69 5. The evidence in this case fails to show what portion of Mr. Spellman's earnings would have been used in the support of Mrs. Spellman. In no event, therefore, can you allow the plaintiff more than nominal damages.

6. It is not sufficient to entitle the plaintiff to recover, for him to show that defendant may have been guilty of the act of negligence charged in the petition. It is incumbent upon him to show by substantial evidence that some person acting for defendant, in the discharge of some duty imposed upon him by defendant, misplaced the

switch which caused the accident. If the evidence leaves it uncertain whether some employe of defendant, or some unknown party, is responsible for the misplaced switch, the plaintiff cannot recover.

7. There is no claim in the petition that there was any negligence in the employment of a track-walker or inspector of tracks. Nor is there any claim that the defendant was negligent in making an inspection of the track. You cannot, therefore, find for the plaintiff on the theory that there was negligence on the part of defendant in employing an inspector, or in the manner of making the inspection.

Each and all of said instructions were refused by the court, to which several rulings of the court, the defendant at the time duly excepted, and such exception was noted by the presiding judge upon each of said instructions; and defendant further filed and presented to the court and to counsel for plaintiff its written exceptions to the refusal of the court to give the instructions requested by it, with grounds therefor, being paragraphs 5, 6, 7, 8, 9, 10 and 11 of the Exceptions set out below.

After submission by the Court to counsel of proposed Instructions to be given the jury and before reading same to the jury, Defendant filed and presented to the Court and counsel for plaintiff, the
70 following exceptions to Refusal to give instructions asked by defendant, and Exceptions to Instructions submitted to counsel by the Court, as Instructions to be given to the Jury:

I.

Exceptions to Instruction #3.

Defendant excepts to Instruction #3 of the Charge to the jury prepared by the court, before the same is read to the jury, for the following reasons:

1. The instruction does not confine the jury to the allegation that the defendant was negligent in that its employes opened and left open the switch, causing the derailment, and there is no other negligence charged in the petition which there is evidence tending to support.

2. There is no evidence that defendant's track was in an unsafe condition for any reason, except that the switch in question was open, and the court should not submit to the consideration of the jury a claim of negligence which there is no evidence tending to support.

II.

Exceptions to Instruction #4.

Defendant excepts to Instruction #4 of the Charge to the jury prepared by the court, before the same is read to the jury, for the following reason:

The court should have told the jury that if they failed to find the

facts stated in the instruction, they should find for the defendant,
instead of telling them that if they failed to find said facts,
71 they should find for the defendant upon the charge that the
switch was opened by defendant's employes. If the jury failed to find affirmatively the facts stated in the instruction, the defendant is entitled to a verdict, and the court should so charge.

III.

Exceptions to Instruction #6.

Defendant excepts to Instruction #6 of the Charge to the jury prepared by the court, before the same is read to the jury, for the following reasons:

The court omits in said instruction to tell the jury that there can be no recovery on account of money which it finds Mr. Spellman would have earned but which would have been used by Mrs. Fannie Spellman in the support of her mother or other relatives, who were not related to Mr. Spellman. There can be recovery only for loss of support of Mrs. Spellman, and money which would have been earned by Spellman but which would have been expended in the support of persons who were *is* no wise related to Mr. Spellman cannot be recovered by plaintiff on account of loss of support by Mrs. Spellman.

IV.

Exceptions to Instruction #7.

Defendant excepts to Instruction #7 of the Charge to the jury, prepared by the court, before the same is read to the jury, for the following reasons:

The court under the undisputed evidence should have charged
the jury as a matter of law that Mr. Spellman was guilty of
72 negligence contributing to his injury, and should not leave
that question for the determination of the jury.

V.

Defendant*s* excepts to the refusal of the court to give Instruction #1 asked by it, for the following reason:

The undisputed evidence in this case fails to establish a right to recover and fails to prove negligence on the part of defendant which was the proximate cause of the injury of which plaintiff complains.

VI.

Defendant excepts to the refusal of the court to give Instruction #2 asked by it, for the following reason:

The undisputed evidence in this case shows that the cause of action set up in plaintiff's petition as amended is barred by the

statute of limitations; the undisputed evidence shows that John J. Spellman died on March 29, 1910, and the cause of action set up in the petition as amended was not pleaded nor was suit brought thereon until more than three years after the cause of action arose.

VII.

Defendant excepts to the refusal of the court to give Instruction #3 asked by it, for the following reason:

The undisputed evidence shows that the track approaching the switch in question from the direction from which the train was moving was for a long distance a straight track; that the day was a bright, clear day; that the target on the switch was in such position as to indicate danger and show that the switch was not closed;
73 that the tracks were out of alignment and were not properly lined up for the main track nor for the side track, and these facts appearing from the undisputed evidence, the court should tell the jury as a matter of law that Mr. Spellman was negligent and that his negligence contributed to the injury of which plaintiff complains.

VIII.

Defendant excepts to the refusal of the court to give Instruction #4 asked by it, for the following reason:

The money referred to in the said instruction is not recoverable in this case. There can be no recovery for loss of support of the mother or other relatives of Mrs. Spellman who were in no wise related to Mr. Spellman.

IX.

Defendant excepts to the refusal of the court to give Instruction #5 asked by it, for the following reason:

The evidence fails to show what portion of Mr. Spellman's earnings were used in his own support, and what portion were used in the support of Mrs. Spellman's mother and other relatives, and without such showing, there is nothing upon which the jury can determine from the evidence what portion of Mr. Spellman's earnings would have been used in the support of Mrs. Spellman.

X.

Defendant excepts to the refusal of the court to give Instruction #6 asked by it, for the following reason:

The attention of the jury should be particularly called in this case to the rule of law therein announced. It is not enough to tell
74 the jury that the burden is upon the plaintiff to establish the fact that the switch in question was opened by defendant's employes, but in view of the evidence in this case, they should be particularly instructed that if the evidence leaves it uncertain whether some employe of defendant or some unknown party was responsible

for the misplaced switch, there can be no recovery. This particularly in view of the argument of counsel for plaintiff that as the evidence did not justify the jury in finding that the switch was opened by a stranger, it follows that it must have been opened by some person in the employ of defendant.

XI.

Defendant excepts to the refusal of the court to give Instruction #7 asked by it, for the following reason:

Counsel has urged in argument to the jury that the defendant company was negligent in employing a man of the age and nationality of Gerardi, and in not employing more track walkers, and that Gerardi was negligent in the manner in which he made the inspection.

Thereupon, the court gave to the Jury the following

Instructions.

Plaintiff as the administrator of the estate of John J. Spellman, deceased, for cause of action against the defendant, a corporation, alleges in substance in his petition and amendments thereto:

That on the 28th day of March, 1910, said Spellman, an employe of the defendant as engineer, was on his engine drawing a regular passenger train on said railway from Des Moines to Oelwein,
75 Iowa, and as his engine reached the yards of the said defendant at Oelwein, it suddenly left the main track on which it was running, at one of the switches of the defendant railroad company in its yards, which switch had been left open by some of the trainmen of the defendant company.

That soon after the engine on which plaintiff's decedent, the said John J. Spellman, was the engineer, left the main track of defendant's railway, on account of the open switch, it became derailed and turned over, and the engineer, John J. Spellman, was caught thereunder and injured, and his body and person were scalded by hot water which came from the boiler of the engine immediately after it overturned, and as a result of his said injuries on the following day the said John J. Spellman died.

Plaintiff further alleges that the defendant was negligent in the following particulars:

1. In that it did not exercise ordinary care in furnishing its employe, the said John J. Spellman, with a reasonably safe track on which to run his engine, in that it permitted its switch to be open in the yards at Oelwein, and thereby the engine on which the said Spellman was in the discharge of his duties, was sidetracked and derailed.

2. In that it permitted its switch to be open at the point and place where the engine of John J. Spellman was transferred from the main line track on which it was running, to a sidetrack and derailed.

3. In that its employes handling and moving its engine and cars in its yards at Oelwein had opened said switch and permitted the same to be and remain open at a time when the said company and its employes in the yards at Oelwein, knew that the train on which the plaintiff's decedent, John J. Spellman, was engineer, was due, and that his train would be sidetracked on account of said switch being open.

4. In that neither it -or its employes moving and handling its trains in the yards at Oelwein, and who had opened and left
76 said switch open, did not signal or otherwise inform the plaintiff's decedent, John J. Spellman, of the fact that said switch had been opened and was open at the time and just before the engine of the said Spellman reached said switch.

Plaintiff states that the said John J. Spellman did not know that said switch was open, or that there was any danger on the main line where his train was running, at the point and place where his engine left said track, and at the time he was injured he was in the exercise of due care and did not in any manner or degree contribute to his injury.

That said John J. Spellman left surviving him a widow, Fannie L. Spellman, who at the time of the death of the said John J. Spellman, was dependent upon him and to whom the said John J. Spellman, previous to his death, gave and contributed the wages which said John J. Spellman earned as engineer on defendant's railway.

That the said John J. Spellman for a long time before and at the time of his death was earning the sum of about $175 per month, all of which he gave to his wife, who is his surviving widow.

Plaintiff further states that he brings this action for the benefit of the said Fannie L. Spellman, the surviving widow of the said John J. Spellman, deceased; that Fannie L. Spellman, the surviving widow of said decedent, has suffered and sustained great damages, to wit, the sum of $20,000, on account of the death of said John J. Spellman, for which sum plaintiff prays judgment against the defendant.

Defendant for answer to said petition and amendments, denies each and every allegation therein contained.

As a further answer, and by way of plea in mitigation, defendant states that the injury to and death of plaintiff's decedent was due to the contributory negligence and lack of ordinary care of said
77 decedent in failing to observe said open switch, and in failing to stop his engine in time to avoid the sidetracking and derailing of said engine.

Instruction No. 1.

The acts of negligence with which defendant is charged and of which complaint is made may be briefly and succinctly stated as follows:

That defendant did not furnish a reasonably safe track on its main line on which the deceased John J. Spellman, an engineer in the employ of defendant, was running an engine, in that a switch

was opened and permitted to be left open within the yard limits at Oelwein, into which said Spellman, without negligence on his part, ran his engine and thereby caused a derailment of the engine to his injury from which his death resulted, and that the employes of defendant in the operation of handling and moving the cars and engine of the defendant in the yards at Oelwein had opened said switch and permitted the same to remain open at a time when said employes and defendant knew that the train on which said Spellman was an engineer was due to arrive and the train would be sidetracked on account of said open switch, and that said employes who had opened said switch failed to inform said Spellman of the fact of said open switch before the engine of said Spellman reached said switch.

You will consider no other charges of negligence against the defendant.

Instruction No. 2.

The burden of proof is upon the plaintiff, and before he can recover he must show by a preponderance of the evidence:

First. That John J. Spellman came to his death as the
78 result of the derailment and overturning of the engine upon which he was the engineer and while in the employ of the defendant and in the discharge of his duties as such engineer.

Second. That the derailment and overturning of the engine was due to the negligence of the defendant company in one or more of the acts of negligence charged, substantially as alleged by the plaintiff.

Third. That the injuries received as the result of the derailment and overturning of the engine and the death of the said John J. Spellman, were occasioned directly and proximately by such negligence.

Fourth. That the said John J. Spellman, deceased, left Fannie L. Spellman as his surviving widow.

Fifth. That the said Fannie L. Spellman, surviving widow, has been damaged in some amount because of the death of her husband.

If you fail to find affirmatively as to any one of the above propositions, then your verdict will be for the defendant.

If you find affirmatively as to each and all of the above propositions, then your verdict will be for the plaintiff in such an amount as you may find, under the evidence and these instructions, he is entitled to recover.

Instruction No. 3.

It was the duty of the defendant railroad company to use ordinary care to furnish John J. Spellman, plaintiff's decedent, with a reasonably safe track over which to run his engine and train. If you find from all the evidence in this case, when weighed in accordance with these instructions, that the plaintiff has established by a preponderance of the evidence, that the main track of defendant's railroad track at the switch in question, was not in a reasonably safe condition, and that such unsafe condition, if you so find, was due

79 to the want of ordinary care on the part of the defendant company, or its employes, in failing to properly care for or to maintain said track at the place in question, and that such unsafe condition and want of care, if any, was the direct and proximate cause of the derailment and overturning of the engine, which caused the death of John J. Spellman, you would then be justified in finding that the defendant company was negligent and that its negligence was the proximate cause of the death of the said John J. Spellman. But if, when you have considered all the evidence in this case, and weighed the same in accordance with these instructions, you do not find that the plaintiff has established by a preponderance of the evidence that the derailment and overturning of the engine was due to the want of proper care on the part of the defendant, or its employes, then you should find for the defendant, upon this claim of negligence.

Instruction No. 4.

The evidence shows without dispute that an open switch caused the derailment and overturning of the engine which resulted in the injury to and death of plaintiff's decedent, John J. Spellman, and one of the acts of negligence charged in the petition is, that the opened switch was due to the negligence of employes of the defendant company, while handling and moving cars in the railway yards of the defendant company at Oelwein, and that said switch remained open at a time when the defendant company and its employes knew that the train on which plaintiff's decedent, John J. Spellman, was engineer, was due to arrive at the place where such switch was located. If you find from all the evidence in the case, when weighed in accordance with these instructions, that plaintiff has established by a preponderance of the evidence, that the switch in ques-
80 tion was opened by employes of the defendant company, while handling and moving cars in the railway yards of the defendant company at Oelwein, and that said switch remained open at a time when the defendant company knew, or by the exercise of ordinary care should have known, that the train on which John J. Spellman was engineer was due to arrive on the main line at such switch, you would then be justified in finding that the defendant company was negligent, and that its negligence was the proximate cause of the death of the said John J. Spellman. But if, when you have considered all the evidence in the case and weighed the same in accordance with these instructions, you do not find that the plaintiff has established by a preponderance of the evidence that the switch was opened by employes of the defendant company while handling and moving cars in the railway yards of the defendant company at Oelwein, and that said switch remained open at a time when the defendant company knew, or by the exercise of ordinary care, should have known, that the train on which John J. Spellman was engineer was due to arrive on the main line at such switch, then you should find in favor of the defendant upon this claim of negligence.

Instruction No. 5.

Notwithstanding the duty of the defendant, as you have been heretofore instructed, to exercise ordinary and reasonable care to provide and maintain a track reasonably safe for the passage of the engine driven by the decedent John J. Spellman, the defendant had the right to assume that said Spellman in running his engine would exercise reasonably his own senses of sight and reason to avoid running his engine and train into an opened switch, which switch he might be required to pass over with his engine and train.

As the train was approaching the switch in question it
81 was the duty of the decedent John J. Spellman to exercise reasonable care under the circumstances to look ahead to ascertain the condition of the switch to determine whether the same was or was not set for the passage of the engine and train on the main track, and if said Spellman saw, or by the exercise of the ordinary care required of him as an engineer under the circumstances could have seen, that the switch was opened before reaching the switch in question, it became his duty to stop his train if, by the exercise of the ordinary care required of him under the circumstances, he could have stopped his train before he came to the switch and thereby have prevented a derailment. If you find under the evidence, weighing and considering it, that the decedent John J. Spellman failed to exercise the care required of him under the circumstances as he approached the switch with the engine in the matter of looking at the said switch and in stopping or taking steps to stop his engine and the train drawn by the engine, then the said decedent was guilty of contributory negligence.

Instruction No. 6.

If you find for the plaintiff you will then be required to fix the amount of his recovery herein.

The plaintiff is the administrator of the estate of the deceased, and as such he brings this action. But he is entitled to recover only the pecuniary loss, if any, which it is shown by a preponderance of the evidence the surviving widow of John J. Spellman, deceased, whose name is Fannie L. Spellman, has suffered by reason of her husband's death.

If you have found affirmatively as to all of the propositions stated in Instruction No. 2 hereof, and you further find that the said John
J. Spellman was not guilty of any negligence on his part
82 which contributed in any degree to cause his injury and death, then the plaintiff will be entitled to a verdict for the present worth of the pecuniary loss said surviving widow has sustained by reason of the death of her husband, or, in other words, such an amount, if any, as paid now will fairly and justly compensate her for said pecuniary loss. The pecuniary loss, to her, if any, consists only of such sum as now paid will represent and equal such sums or amounts of money as under the evidence you can fairly and justly find he,

the husband, would have contributed to her had he not lost his life at the time and in the manner as shown by the evidence.

From the nature of the things involved, such amount it is impossible to accurately and definitely establish, and the amount of your verdict must be left to the common sense, good judgment and sound discretion of the jury. Evidence has been introduced as to the earnings of the deceased and as to his disposition of his earnings during his life, and immediately before his death. You will take into consideration his earnings and what proportions thereof were used during his lifetime for himself personally, and what if any proportion of his future wages if he had lived would have been used for his own personal expenses, and ascertain from the evidence the amount of pecuniary loss the surviving widow has sustained because of the death of her husband.

In no event should your verdict be for a greater amount than $20,000.00, the amount claimed in the petition.

Instruction No. 7.

Under the law under which this action is brought, the fact that John J. Spellman was guilty of negligence, if you find that he was guilty of negligence contributing to his injury and death, is not a bar to the right of the plaintiff to recover herein, if he has established negligence on the part of the defendant under the instructions heretofore given you; but the pecuniary loss, if any, which in the absence of such contributory negligence you would allow plaintiff shall be diminished by you in proportion to the amount of negligence attributable to said John J. Spellman and which contributed to his injury and death. It is for you, under the evidence, to determine the degree or extent to which the negligence, if any, of said John J. Spellman contributed to his own injury. If you find that the negligence of John J. Spellman contributed equally with the negligence of the defendant company to the injury and death of said John J. Spellman, then you should diminish the pecuniary loss which you find the plaintiff has sustained by one-half, and return your verdict for the remainder. If you find that the negligence of John J. Spellman was greater or less than that of the defendant, then you will diminish the pecuniary loss which the plaintiff is entitled to recover in proportion as you so find, and return your verdict for the remainder.

83

Instruction No. 8.

The fact that an accident may have happened and the deceased sustained an injury from which his death resulted at or about the time and place alleged in the petition of plaintiff does not establish the fact of negligence, nor does it raise a presumption that the defendant was negligent, for negligence must be proven.

The business of running a railway engine is a hazardous one, and the employe who enters upon such employment assumes the ordinary risks and hazards incidental to such employment.

The employe does not, however, assume risks and dangers which arise from and which are due to the negligence of the employer.

84 The defendant is not an insurer of the safety of its employes. It is only liable when it is shown to have been guilty of one or more of the acts of negligence charged, and when it is further shown that such acts of negligence were the proximate cause of the injury, and because thereof the widow has sustained damages.

Instruction No. 9.

Plaintiff seeks to recover damages for the benefit of the surviving widow of his decedent, and what are known as life tables have been admitted in evidence to aid you in finding the expectancy of the life of said John J. Spellman at the date of his injury and death. These tables however, are not conclusive as to the age which the said Spellman might have attained had he died a natural death or had not received the injury complained of, because the duration of life is uncertain.

These tables, however, are to be weighed by you as other evidence is weighed, and such, and only such, weight given them as they may be fairly entitled to receive in connection with the other evidence in the case affecting the probable duration of life of the said decedent, his general health at said time, vocation and habits, and all such facts shown in evidence are to be considered by you in finding the expectancy of life of the said John J. Spellman as a basis for estimating the damages, if any, sought to be recovered in this action.

Instruction No. 10.

"Ordinary care" is that degree of care which an ordinarily careful and prudent person would exercise under the circumstances.

"Negligence" is the want or omission of ordinary care.

85 The failure to do something which a reasonable person, guided by those considerations which ordinarily regulate the conduct of human affairs, under the circumstances, would do; or the doing of something which such a person, under such circumstances, would not do.

"Contributory negligence" is such negligence as contributes to an injury.

By "proximate cause", is meant a moving or producing cause, and an act or omission is the proximate cause of a condition or injury sustained only when it appears that if it had not been for such act or omission the said condition would not have been brought about or the said injury sustained.

Instruction No. 11.

By "burden of proof" is meant the obligation resting upon a party to prove the truth of an allegation made by him, which is denied by his opponent.

"Evidence" is whatever is exhibited to a court or jury whether it be matter of record or writing, or by the testimony of witnesses in order to enable them to pronounce with certainty concerning the truth of any matter in dispute.

Instruction No. 12.

You are instructed that the phrase "the preponderance of evidence", means, in law, simply the greater weight of evidence. It is determined by fully and fairly considering and weighing all the testimony of each witness and the aggregate testimony of all the witnesses, giving to their testimony, and to the testimony of each, such weight as you may deem it entitled to when taken in connection with the other facts and circumstances proven upon the trial of the case.

86 That side has the preponderance of proof which introduces evidence sufficient to outweigh that introduced against it. The apparent consistency, fairness and reasonableness of the evidence introduced is to be considered. If any of the evidence is not entitled to belief, it should be cast aside and ignored. Doubtful and uncertain evidence should be weighed for just what, in your judgment, it is worth. All the evidence is to be considered, together with all the facts and circumstances shown on the trial, and the preponderance of the evidence should be found with that side in whose favor the greater weight of evidence is produced.

Instruction No. 13.

Under the oath taken by you as jurors your duties, although of the highest importance, are very simple. You have only to ascertain the facts as established by the proofs, and without regard to consequences, return your verdict accordingly.

You are to try and determine this case according to the evidence produced and submitted to you in open court on this trial and the law as given you in charge by the court in these instructions and upon nothing else.

You are the sole judges of the facts in the case and the court instructs you as to the law. The court has not, however attempted or intended to embody in any one instruction all of the law applicable to the case. You are to consider and construe all the instructions together and apply them as a whole to the evidence in the case.

Instruction No. 14.

You are the sole judges of the credibility of the witnesses and of the weight to be given their testimony. In weighing the

87 testimony of each you will take into consideration his age, intelligence, strength of memory and means of knowledge, his relation or feeling toward the parties, interest, if any, in the result of this suit, demeanor while testifying, the time that has elapsed since

the occurrence of which they testify, the reasonableness or otherwise of matters testified to, whether corroborated or contradicted by other witnesses, or by facts proven, and all matters appearing fairly tending to show the weight and credit that should be given.

Instruction No. 15.

Herewith are submitted two forms of verdict. You will use whichever one conforms to your finding, and have the same signed by one of your number as foreman.

A special interrogatory is also submitted to you, which you will answer by writing the word "Yes" or "No," following the word "Answer," according as you may find from the evidence the fact to be; and have the same signed by one of your number as foreman.

Your verdict and your answer to the special interrogatory should be returned into open court.

To the submission to the jury of the Statement of the Issues by the Court, and to the giving of the Instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and to the giving of each thereof, the defendant at the time duly excepted.

On the 31st day of October, 1913, the jury returned into court the following

Verdict.

We, the jury, find for the plaintiff and fix the amount of his recovery at $11,150.00.

(Signed) J. E. SEXTON, *Foreman.*

88 In addition to the general verdict, the jury returned the following

Answer to Special Interrogatory.

Was the open switch which caused the derailment of the engine which Mr. Spellman was driving opened by any officer, agent or employe of the defendant? Answer—Yes.

On the 31st day of October, 1913,

Judgment

was rendered upon said verdict and entered of record by the court, in favor of the plaintiff and against the defendant, for the sum of $11,150.00, with interest and costs, to which judgment, the defendant at the time excepted.

Thereupon and within the time fixed by law, defendant filed the following

Motion to Set Aside Verdict and Judgment and for a New Trial.

Comes now defendant and moves the court to set aside the verdict and judgment herein and to grant a new trial, for the following reasons:

1. The verdict is contrary to the evidence.
2. The verdict is not supported by sufficient evidence.
3. The verdict is contrary to law.
4. The verdict is contrary to the instructions of the court.
5. The special finding of the jury is contrary to the evidence.
6. The special finding of the jury is not supported by sufficient evidence.
7. There is no evidence in the record which warranted the
89 jury in finding that the switch was opened by any of defendant's employes, and such finding is directly contrary to the undisputed evidence.
8. The damages allowed by the jury are excessive.
9. The court erred in overruling defendant's motion to direct a verdict for the defendant, made at the close of plaintiff's evidence.
10. The court erred in overruling defendant's motion to direct a verdict for the defendant, made at the close of all the evidence.
11. The court erred in refusing to give Instruction #1 asked by defendant.
12. The court erred in refusing to give Instruction #2 asked by defendant.
13. The court erred in refusing to give Instruction #3 asked by defendant.
14. The court erred in refusing to give Instruction #4 asked by defendant.
15. The court erred in refusing to give Instruction #5 asked by defendant.
16. The court erred in refusing to give Instruction #6 asked by defendant.
17. The court erred in refusing to give Instruction #7 asked by defendant.
18. The court erred in giving Instruction #3 of its charge to the jury, for the reasons set forth in the exceptions to said instruction submitted to the court before said instruction was read, and now on file herein.
19. The court erred in giving Instruction #4 of its charge to the jury, for the reasons set forth in the exceptions to said instruction submitted to the court before said instruction was read, and now on file herein.
20. The court erred in giving Instruction #5 of its charge to the jury, for the reasons set forth in the exceptions to said in-
90 struction submitted to the court before said instruction was read, and now on file herein.
21. The court erred in giving Instruction #6 of its charge to the

jury, for the reasons set forth in the exceptions to said instruction submitted to the court before said instruction was read, and now on file herein.

22. The court erred in giving Instruction #7 of its charge to the jury, for the reasons set forth in the exceptions to said instruction submitted to the court before said instruction was read, and now on file herein.

23. The court erred in overruling objections of defendant to questions propounded by plaintiff's counsel in numerous instances, as shown by the official shorthand report of the trial.

24. The court erred in numerous instances in sustaining objections by counsel for plaintiff to questions propounded by counsel for defendant, as shown by the official shorthand reporter's report of the trial.

Said motion was by the court, on the 26th day of December, 1914, overruled in the following opinion, to which ruling, the defendant duly excepted:

Verdict and judgment for plaintiff, and motion of defendant for a new trial.

Spellman was in the employ of the defendant as an engineer and while running an engine it was derailed, causing his death. It is alleged that the deceased came to his death while operating a train engaged in interstate commerce, and "that on account of the death of said decedent his estate has suffered and has sustained great damages, to wit, the sum of $20,000.00," for which judgment is asked.

In the original petition nothing is stated about the persons the deceased left surviving, although the suit is brought to recover under the provisions of an act of Congress commonly known as the
91 Employers' Liability Act of April 22, 1908, which in terms provides:

"That every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and if none, then of such employe's parents; and if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence, etc."

The accident which caused the death of decedent occurred on the 28th day of March, 1910, and suit was commenced April 20, 1911. The decedent survived his injuries several hours. As commenced, the suit brought by the administrator of the estate of the decedent was for the damages suffered and sustained by the estate of the decedent, and not for the "pecuniary loss," sustained by the widow of decedent in consequence of his wrongful death. In answer to the petition the defendant filed a general denial and further a plea in mitigation of damages because of the alleged contributory negligence of the deceased.

On October 13, 1913, more than two years after the accident occurred, an amendment to the original petition was filed, wherein, for the first time, it is alleged that the deceased left surviving a wife, Fannie L. Spellman, to whom, prior to his death, during his employment as an engineer for the defendant, he had regularly given each month his pay checks, which averaged about $175.00 per month.

It appeared in evidence that the deceased left surviving not only his wife but married daughters, neither of whom was dependent upon or living with the decedent at his death, and that prior to the commencement of the suit the daughters had assigned their
92 respective interests in the claim against defendant to their mother, the widow of decedent. Nothing is stated, either in the original petition or the amendement, about the assignment of the interest of the daughters to their mother.

Defendant moved to strike the amendment of plaintiff from the files for reasons, among others, that the amendment stated a new cause of action and it was barred by the statute of limitations. The motion was overruled.

Defendant answered and plead the statute of limitations. At the close of the plaintiff's evidence the defendant moved for a directed verdict, alleging among other causes that the action was barred, and renewed the motion at the close of all the evidence, both of which motions were overruled. Defendant further asked the court to instruct to the effect that the cause was barred, but the request was refused.

The petition as originally drawn was without question in accord with the remedy authorized by the code of this state, section 3445. This section supplements the provisions of the two preceding sections of the code to the effect that an action is not abated by death but survives and provides that the cause of action is deemed a continuing one and to have accrued to the legal representative of the deceased at the time it would have accrued to the deceased if he had survived. Manifestly, the legislature by this section has created a right not theretofore existing, to wit, the right of an administrator of the estate of the decedent to maintain an action for an injury resulting in death, because, by virtue of the statute, the cause of action survives. But such cause of action survives to be maintained only by the person authorized by statute to prosecute it.

The last conclusions are supported by the following cases, to wit: Mowry v. Chaney, 43 Iowa 609, wherein it is said that, "A right of action (for the death of a wife by negligence) therefore
93 exists only in favor of the administrator of her estate," and denying the husband the right to maintain a suit individually for damages because of her death; Hyde v. Railway Co., 61 Iowa 441, holding that, "A cause of action which survives only by statute, must survive to the person or persons designated by statute"; Major v. B. C. R. & N. R. Co., 115 Iowa 309, wherein an action had been brought by a widow for damages for the wrongful death of her husband but denied, the court saying, "Nothing in these statutes indicates a purpose to create a cause of action in favor of wife or

children save as they share in the distribution of damages recovered freed from any claim from creditors"; and in the later case of Romano, Admr., v. Capital City Brick & Pipe Co., 125 Iowa 591, which says, "Now, we cannot see how, for the purposes of this action, it is necessary to determine who are his heirs, and as such heirs, will be entitled to distributive shares in his estate, whatever it may be."

Our statutory provisions do not create a new cause of action, but do abrogate the common law rule by which an existing cause of action is terminated on the death of the party entitled to recover.

But as to the act of Congress above quoted, it has been held (Mich. Cent. R. R. Co. v. Vreeland, 227 U. S. 59, p. 67), that it does not provide for any survival of the right of action created in behalf of an injured employe. That right of action was therefore extinguished. The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employe wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death. * * * The cause of action is independent of any cause of action which the decedent had and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had, and one proceeding upon altogether different principles.

94 Congress has exerted the power it has to legislate upon this subject because of its power to regulate commerce between the states and having exerted this power and enacted a law covering the subject of the liability of railroad companies to their employes while engaged in interstate commerce, such legislation of necessity supersedes all legislation over the same subject by the states.

Consequently, and as held in the case, Mich. Cent. R. R. Co. v. Vreeland, supra, unless the act of Congress, above quoted, which declares the liability in this case and now asserted, provides that the right of action shall survive the death of John J. Spellman, it does not pass to his representative.

It is also held that the question of survival is not one of procedure, but one which depends on the substance of the cause of action. As the cause of action is stated in the original petition, is it in result "for the benefit of the surviving widow?" If it is, the amendment does not state a new cause of action, for it only changes the form without changing the substance of the original petition.

Under the code of Iowa the action must be brought and maintained in the name of the legal representative of the estate, and so under the act of Congress.

Under the act of Congress, in case of the death or the emplove the wrong-doer is liable in damages to his or her personal representative, (1) for the benefit of the surviving widow or husband and children of such employe; and if none, (2) then such employe's parents; and if none, (3) then of the next of kin dependent upon such employe.

Section 3313 of the code of Iowa, 1897, provides, "When a wrongful act produces death, damages recovered therefor shall be disposed of as personal property belonging to the estate of the de-

ceased, but if the deceased leaves a husband, wife, child or parent, it shall not be liable for the payment of debts."

95 Under the facts in this case, if the action would lie under the statutes of this state, the personal representative would prosecute the suit for the benefit of the surviving widow Fannie L. Spellman. Under the Federal statute he prosecutes the suit for the benefit of the same person as he would under the state statute.

As applied to the facts of the case at bar the measure of damages is the same, to wit, "pecuniary loss" to te beneficiary. See Rose v. Des Moines Valley R. Co., 39 Iowa 246; Dwyer v. Chicago, St. P. & O. Ry. Co., 84 Iowa 479; McCoullough v. C. R. I. & P. R. Co., 142 N. W. 67, p. 70; Mich. Cent. R. R. Co. v. Vreeland, supra. Whether the action is prosecuted under the state or federal statutes, the beneficiary is the same, to wit, the widow of the decedent, Fannie L. Spellman.

The cause of action, whether under the state law or the act of Congress, is grounded upon the original wrongful injury to the decedent, John J. Spellman; it is also for the exclusive benefit of certain specified relatives, and under either statute the damages are such as flow from a deprivation of the pecuniary benefits which the beneficiary might have reasonably received if the decedent had not been injured and died therefrom.

Under each statute the administrator is the real party in interest—the indispensable party plaintiff to the suit.

If the cause had been tried upon the original petition brought as it is to recover under the federal statute, as appears on its face by apt averment, and a verdict been returned the same as now, could the defendant have moved in arrest of judgment upon the ground that the facts stated by the petition do not entitle the plaintiff to any relief whatever?

As the suit is and can only be brought and recovery had under the express provisions of the federal act, plaintiff could only have maintained his case by showing the existence in fact of one

96 of the three classes of beneficiaries for whose benefit he was prosecuting the suit. But the absence of an allegation in the petition that the suit is for the benefit of the widow of decedent goes rather to the manner or form of pleading than to its substance, and in such a case a motion in arrest is not available.

I submit another test. If the plaintiff under the original petition had a recovery as now, before the two-year limitation had passed, could he have commenced and maintained a second suit, alleging, as in the amendment, that the suit was for the benefit of the widow Fannie L. Spellman? Manifestly not, unless in reply to the plea in bar of former adjudication, or estoppel, or satisfaction if the judgment had been paid, he could have, in law, maintained a plea that the beneficiaries in the two suits were different, and a recovery for one, "the estate of decedent," with the benefits going to the widow Fannie L. Spellman, was not a bar to a suit "for the benefit of the widow Fannie L. Spellman."

In the case before us we have identity of parties required by both statutes to wit a suit by an administrator. There is also identity

of cause for action, whether the suit is prosecuted under the state law or under the act of Congress. There is also identity of interest, to wit, recovery for "pecuniary loss," as determined by the state and federal statutes upon the subject. There is also identity of beneficiary, considering the question of benefit alone, either under the statutes of the state or the act of Congress. The evidence and the amount of proof to establish the tort would be the same whether under the state statute or under the act of Congress, and also the same to establish the "pecuniary loss" sustained. The evidence and amount of proof would be the same whether the cause was tried under the original petition or under the petition as amended. The issues are not changed because of the amendment. Recovery in damages is sought for the same wrongful act whether under
97 the original petition or under the petition as amended.

A case somewhat in point is found in 93 Fed. R. 260, C. C. A. Third Circuit, 1889, Van Doren v. Pennsylvania R. Co., in which it was held that where a plaintiff is both widow and administratrix of the decedent, in bringing an action under a statute to recover damages for his death, sued in the wrong capacity, the court should, in furtherance of justice, on seasonable application, allow an amendment changing the capacity in which suit was brought in order to conform to the statute, when such amendment will not change the issues, the measure of recovery nor in any way prejudice the defendant.

In Hale v. L. & N. R. Co., 157 Fed. 464, (Fla. 1907) action was brought in a state court by the widow of a deceased employe in her own right as allowed by a state statute. On petition therefor the cause was transferred to the federal court, and after the lapse of two years plaintiff asked leave to amend her petition so that she sued as administratrix of the estate of the deceased for the benefit of the widow The court refused to grant the leave to amend because the amendment introduced a new and independent cause of action, because it was a departure from law to law.

The case of Atlanta K. & N. Ry. Co. v. Hooper, 92 Fed. R. 820, (Sixth C. C. A., 1899), involved questions under the statutes of Tennessee and their construction by the courts of that state. There was a change in beneficiaries made after the lapse of two years. Under the statutes in question, as construed by the Supreme Court of that state, a petition drawn thereunder which does not set forth the person for whose benefit the suit is brought is fatally defective. It is pointed out that under the statutes the cause of action may vary materially in the extent of recovery for one or another beneficiary, and that the suit for one beneficiary is a different suit from
98 a suit by him for another. The plea of the statute of limitations was therefore held good.

The case of Lilly v. Charlotte C. & S. R. Co., 10 S. E. Rep. 932 (S. C., 1890), is another case of pleading. From the petition as originally drawn it did not appear that there were any parties, directly or by representation, interested in the action. Leave was asked to amend by adding; "That said plaintiff was the widow of said Green Lilly, deceased, and she brings this action for the benefit of her

self and her several children by the said Green Lilly." The court held, two years having elapsed before the amendment was asked, that to allow the amendment would give a cause of action where none was alleged, and in this case where none could exist because of the lapse of time.

Bolton v. Ga. P. R. Co., 10 S. E. R. 352, (Ga., 1889); an action under the common law right for personal injuries by a servant against a master for knowingly furnishing defective material, the change by an amendment to a reliance on the provisions of an Alabama statute cannot be allowed because this is a departure from law to law and states a new cause of action.

Union P. R. Co. v. Weyler, 158 U. S. 285, 15 S. C. 877, contains a careful and exhaustive discussion of the question at bar. The original petition was for negligence of the railway company in employing and retaining a fellow servant who was known to be incompetent, by means of whose incompetence and negligence a heavy iron dump was permitted to fall upon the plaintiff. The amendment counted upon the negligence of the same fellow servant and the statute of Kansas which charges a railroad corporation with the negligence of the fellow servants of the injured employe. The original petition counted upon a liability of the railroad company under the common law; the amendment upon a liability under the statute of Kansas. Both causes of action were based on the same
99 transaction and resulted from the same state of facts. It was held that the amendment stated a new cause of action and that it was barred by the statute of limitations. The case clearly shows a departure from law to law, and where a new cause of action is stated it does not relate back to the filing of the original petition.

As applied to the facts in the case at bar and for reasons heretofore suggested, I do not think there is a departure from the original petition.

II.

It is contended that the verdict is excessive.

In cases of this character there is no measure of damages which controls the jury, and that feature of the case must be left to a wise and well guarded discretion. There are many elements which enter into any computation to fix the damage, and unless the verdict so overreaches the limits of reasonableness and fairness as to suggest bias and prejudice, the court will not interfere.

In the instant case nothing can be recovered for bodily suffering, mental anguish and the like, but only the "pecuniary loss" sustained by the wife Fannie L. Spellman. The earnings of the deceased, on an average about $175.00 per month, were given to the wife, and therefrom deceased received such sum as was necessary for his personal use for clothing and support while absent from home.

In the case of McCoullough v. C. R. I. & P. R. Co., *supra*, the question of damages, that is, the "pecuniary loss" of each of the three different classes of beneficiaries is considered, and it is said, "Manifestly, the measure of damages in favor of the first class will

be essentially different from that in favor of the second and third classes."

Mrs. Spellman is of the first class, and the verdict under
160 the evidence is fairly commensurate with the "pecuniary loss" sustained.

The motion for a new trial is overruled. Defendant excepts.

On the 30th day of January, 1914, defendant perfected an appeal to the Supreme Court of the state of Iowa, by serving upon the plaintiff and upon the Clerk of the District Court of Polk County, Iowa, a

Notice of Appeal

in due form as required by law, which was on the same date filed with the said Clerk.

Certificate.

We certify that the above and foregoing abstract is a full, true and correct abstract of the record of the trial of this case, and that it contains all the evidence offered and all the evidence introduced, together with all objections, rulings and exceptions thereto, and fully sets forth the pleadings, bill of exceptions, exhibits, instructions, verdict, motion for new trial, judgment, appeal and all other matters of record in this case.

CARR, CARR & EVANS,
Attorneys for Appellant.

We certify that the cost of printing the foregoing abstract is $—.
CARR, CARR & EVANS.

Notice is hereby given that upon the submission of this case, counsel for appellant will ask to be heard in oral argument.
CARR, CARR & EVANS.

161 Service of the within abstract is accepted this — day of March, 1915, together with receipt of copies thereof.

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Attorneys for Appellant.

In the Supreme Court of Iowa, May Term, 1915.

At Law.

L. W. BASHAM, Administrator of the Estate of John J. Spellman, Deceased, Appellee,

vs.

CHICAGO GREAT WESTERN RAILROAD COMPANY, Appellant.

Appeal from Polk County District Court.

Hon. C. A. Dudley, Judge.

Carr, Carr & Evans, Attorneys for Appellant.
Clark, Byers & Hutchinson, and Thos. A. Cheshire, Attorneys for Appellee.

Appellee's Abstract of Record.

102 The appellant has omitted the following from the cross-examination of the witness Sheriff, which should be inserted immediately after the word "passenger" in line 18 on page 13 of appellant's abstract: "It is a railroad proposition. I have been in the business, had charge of a roundhouse myself and know who is to have them." (Trans. 20-21.)

"Q. You can answer the question, can't you? Then you don't know except now as you draw your conclusion from your knowledge of general situations, you don't know whether these men had keys or didn't have, do you?

A. I know they have got to have them to do their work." (Trans. 22.)

The word "piece" in line 8 on page 14, appellant's abstract, should be "place." (Trans. 25.)

The appellant has omitted the following from the redirect examination of the witness Sheriff, which should be inserted between the lines 24 and 25 on page 14 of appellant's abstract: "The last I worked there and the last place, I was running the injector room, in charge of the injector and lubricator, steam heat governor. That was located in the main shop, on the balcony, second floor. During the time I was at work there I was in the main shop. (Trans. 26.)

While I was working for this company in the shops there I knew who were supplied with keys for these switches. I had them thrown for me several times." (Trans. 26-27.)

Commencing with the word "The" at the last of line 26 through the word "open" in the 29th line on page 16 of appellant's abstract, should be changed to the following:

"Well, as the target set there, as I say it was slanted just a very little, but not enough to show that the switch was open." (Trans. top page 34.)

There should be inserted after the word "fresh" in line 22 on page 27 of appellant's abstract, the following: "The normal posi-
103 tion of the lock in this hasp would be with the keyhole facing you when you go to unlock the switch, which would be up facing you." (Trans. 82.)

Appellant has omitted the following from the cross-examination which should be inserted after the word "new" in line 30 on page 27 of appellant's abstract, "I looked at the hasp in which this lock was hanging, carefully, at that time, and the hasp was not worn through at one point, to my recollection. I was inspecting the appliance and every part of it carefully and examined the hasp carefully. My recollection of my inspection was that the hasp was in good shape." (Trans. 85-86.)

"My recollection says this hasp wasn't rusty and worn thin at one point or one side of it when I was examining it immediately after the accident. My recollection is that it was in first class condition. It ain't my recollection that the condition of the hasp in which the lock was hanging at the time I was examining it is as shown in the photograph Exhibit 'C.'" (Trans. 87.)

After the word "there" in line 25 on page 28 of appellant's abstract, should be inserted the following from the cross-examination of the witness, Paul B. Vermillion: "The houses run, if I remember right, north and south there about a block away. There were 15 or 20 houses there that were occupied by people, so far as I know. Between these 15 or 20 houses that were occupied by people living in them and this switch, there was nothing whatever to obstruct the vision of this switch from those houses that I recall." (Trans. 97.)

"If there had been anything to obstruct I would recall it. I know the situation there. Am familiar with it and was then." (Trans. 98.)

"When this passenger train, on which Spellman was employed before the accident, is turned the time varied more or less ac-
104 cording to the work the engine was performing,—that duty was assigned to. If she was working over in the shop tracks or some place and was not through with her work she would keep on performing her duty until she had a little spare time to do it. Then she would take and run the train around what they called the "Y," take and reverse it. In running the train around the "Y" this engine I refer to was the switch engine." (Trans. 99.)

After the word "engine" in line 27 on page 28, the following should be inserted from the cross-examination of the witness Paul B. Vermillion: "When the train arrived at the station the engine pulling it would be detached and this particular switch engine when it got time would take hold of this train and switch it. In doing this they would go east in the direction of Chicago upon what we call the ice house track, which runs parallel with the main line to Chicago, to the east switch of the "Y," and then back around. The east switch of the "Y" was about a quarter of a mile from the station. After opening the east switch they would back in a southerly direction to the switch situated on the southern division main line, approximately a third of a mile. The track shown to the right of the main line in

the photograph Exhibit "B" is the southerly end of this "Y" track. It did not cross any other lines between the point where this train was derailed and the point there on the ice track parallel with the Chicago track. There was a switch in there. This switch that you can't see for the storage track, and the switch on the opposite side going into the oil ware houses. They don't cross anything. Into this "Y" track there were two stub switches. One of them is shown in the photograph, on which cars are standing, and the other one was on the other side of the track up some distance into an oil house. (Trans. 99-100.)

After the word, "on" in the 29th line on page 28 of appellant's abstract, should be inserted, "they branch off from the 'Y.'" (Trans. 101.)

105 After the word "track" in the 12th line on page 29 of appellant's abstract should be inserted the following from the cross examination of the witness Paul B. Vermillion: "The main is between these side tracks and the "Y" track. The switches for the storage tracks did not run across the main line from the "Y" track. The main line track is shown in Exhibit "B." They extend on north there as shown in photograph Exhibit "B." This "Y" track goes up probably a distance of four or five hundred feet and branches off to the right and these storage tracks I refer to are on the east side of the main line going around. (Trans. 104.) This main line goes off to the left of the storage tracks before it comes to the storage tracks. To switch this train that arrived at 2:30 they would go to this east track a quarter of a mile from the depot and then down the "Y" track and the track where this train was derailed they would push out on the main line at that point and then the switch engine would pull them up on the main line to the depot. (Trans. 105.) The track shown in Exhibit "B" at the right of the switch stand and on which cars appear to be standing extends south from the switch stand where the accident occurred six or seven hundred feet and extended north 200 feet beyond that point before it entered the "Y" track. This track at the right of the main track was the storage track, approximately a thousand feet long, and was used as a general proposition for bad order storage cars, although we at one time when we were crowded with stored loaded coal cars there until the boys and men in that neighborhood got so strong on the coal question we had to move them away from there to keep the cars from being emptied. On certain occasions we did have loads of coal there. It was used for empty cars going to the shops as a general proposition. These empty cars arriving in Oelwein would be sent there for repairs. The car would be held there until the shop people would want the car in the shops. We

106 had over here to the left two storage tracks for bad order cars. They were approximately 1200 feet long, each of them, and then we had probably four or five other tracks with bad order cars on. They were away probably a mile up to the west. Two miles west of this point we had probably six or eight hundred bad order cars in there waiting for the shops. (Trans. 107.)

When we had these loads of coal on these tracks in these empty cars that we wanted to get out, or these other loads whatever they were, they were frequently switched out and pushed down on this "Y" track when we had occasion to do it. They would have to be.

I was only in the position two or three weeks before this accident happened. I think your photograph will show there are empty ballast cars in on this track at this time. In March we had no use for ballast cars. This photograph I presume was taken a year or two after the accident happened so of course they are not the cars I refer to.

Q. I thought you said the photograph shows that?

A. No.

Q. What kind of cars?

A. They are box cars, it looks to me as though this fellow here is a coal car.

Q. Yes. Could you tell whether they are loaded or empty?

A. No, you could not tell.

Q. Looking at that photograph you would say these cars were empty cars or loaded cars, weren't freight cars?

A. Knowing the conditions as I do, what that track was used for, I would naturally think they were cars placed there for shopping purposes.

Q. You don't know whether they are or not?

A. No, I don't know.

Q. The photograph does not disclose?

A. No, sir.

107 The Court: That photograph doesn't mean anything to the court. If that evidence is at all material, if you ever get the record beyond this court it don't mean anything to anybody. You don't identify the photograph.

Mr. Cheshire: I have been referring to the photograph, Exhibit "B" in the record all the time. This is with respect to those cars. It is not shown anywhere else, Your Honor, except on Exhibit "B." (Trans. 108-109.)

At the end of the redirect examination of the witness Vermillion, as printed at the top of page 32 of appellant's abstract, the following has been omitted from the redirect examination of the witness Vermillion:

These engines were standing on both tracks. This picture does not disclose these engines. The track on the right hand side of the main line, as it shows in the picture, and also on right hand side of the "Y" track, were used for storage purposes. We had a lot of old shop cars in there waiting for permission to put them in the shop. In addition we had a lot of ballast cars in there that ain't used in the winter time. That storage track has no other connection with the system of tracks, except the switch coming off the "Y" track. (Trans. 136.)

This is a spur track. In putting cars in on that track or in taking them out this switch would not necessarily have to be used. You could take and come down from the other end of the "Y"

track off the main line and back in there and pull them out up the other way. That is optional with the switch foreman, whichever he wanted to work. It would be a convenient way to do it from this end over this switch. (Trans. 137.)

After the word "lock" in the 24th line on page 32 of appellant's abstract, the following should be inserted:

Q. Do you remember how long before this accident you had any occasion, if ever, to use that switch?

108 A. Yes, sir; I did not.

Q. How long was it?

A. I could not tell you now at present. It is so long ago I don't remember.

Q. What is that?

A. It is so long ago I don't remember.

Q. A long while before that. A long while since it occurred. On that particular day at least you did not have any occasion to use it?

A. No, sir. (Trans. p. 141.)

After the word "derailment" in line 20 on page 33 of appellant's abstract, the following should be inserted from the cross examination of the witness Casey:

"I remember I was at this particular switch three days before the derailment because I made it a practice to go over the yards about twice a week and examine all the switches and tracks. I do not remember the circumstance of examining the switch six days before the derailment. I do not recall when I made this examination which I say was three days before the accident. All I can say is it was my custom to examine the switches twice a week. There were about 200 switches in the yards there. In examining these 200 switches I would have to walk about four miles and I would ordinarily devote about a half day to one inspection or five hours. Ordinarily I would give a minute's time to inspecting a switch." (Trans. 149-150.)

After the word "time" in line 24 on page 33 of appellant's abstract should be inserted the following:

"He (Gerade) had to examine the tracks up to the round house and had to examine all the tracks in that yard. He did not walk very fast on account of taking note of everything. He had to examine everything. He had to walk slowly. He didn't have a paper or pencil. He was an Italian. In that inspection he had to

109 look at all the rails, ties, spikes in the rails and all the straps on either side of the rails where they joined, and all the bolts in those straps, making a note of anything that was out of order, and then he had to look at all these 200 switches. We generally kept the main line switches locked. Did not keep the branch switches locked at all. (Trans. 152-3.)

Probably there were a dozen switch locks used in the Oelwein yards. The switch shown in the photograph Exhibit "B" is the only high tower switch stand that was in the Oelwein yards. There were three or four different kinds of switch stands there. The photograph Exhibit "B" is a picture of the ordinary switch stand in the yard. It is

what is called a Ramapoo switch stand. There were probably 20 or 30 of this style. (Trans. 154.)

In addition to these duties, if the inspector saw anything wrong with the turntable, if he could not fix it, he would report it to me; that is, with the rails on the turntable. (Trans. 156.) The switch stand at the point of derailment was there when I went there and remained there about a year afterwards. I did not see the switch crew use the switch stand very often before the day of the derailment of the trains. I did see them switching cars there once in a while. I would observe them at the time they were switching cars once in awhile." (Trans. 156-157.)

The statement in lines 16 and 17 on page 34 of appellant's abstract, as to the time before the accident Gerade walked along the main line, is not a correct statement of the direct examination of the witness Gerade. The following is a literal copy of the transcript on this question:

Q. For the main line. Now how long was it that you walked along there before this accident occurred?

Mr. Cheshire: I object to this as calling for the conclusion of the witness. He was not there when the accident occurred, at the place.

110 A. You mean how long a time?

Mr. Cheshire: And the witness has stated the time that he was there.

A. About one hour I think.

The Court: Wait. Just let me——

(Question read by the reporter.)

Q. If you know.

The Court: He may answer. (Plaintiff excepts.)

A. Fifteen minutes I think. Fifteen or fourteen minutes." (Trans. p. 161-162.)

After the word "track" in line 27, page 34, of appellant's abstract, the following has been omitted from the cross examination of the witness Gerade:

"On the morning the accident occurred I began to walk at 7 o'clock in the morning at the north end. I lived at home. My home was on a car. The company furnished a car. I lived in a car on the side track." (Trans. 163.)

After the word "everything" in line 28, page 34 of appellant's abstract, insert the following:

"Saw the foreman that morning before I commenced to work. He told me each day what I was to do, and he told me every morning that I was to walk the track, and I don't do anything else during that time. When he told me to walk the track that morning I went to the north end about a mile and three quarters north on the main line. I looked at the track and the ties, and the rails and spikes in each of the ties, each spike in every tie, and looked on each side of the rails where they were joined, and saw also that there were no bolts out between these plates on either side of the rails where they were joined together. Looked to see whether there were low points on the track at the joints or any other place. There were 60

or 70 switches between where I started and this mile and a half I walked north, and I stopped at each one and examined them with care. Did not have any book of pencil to note down any
111 defect. I stopped at these switches about two minutes. Some places I stopped five minutes." (Trans. 164-166.)

After the word "line" in line 30, page 34 of appellant's abstract, should be inserted the words "in the box car." (Trans. 168.)

After the word "line" in line 30, page 34 of appellant's abstract, the following is omitted from the cross examination of the witness Gerade:

"I went on that track from the tool box. It is a mile and a half from the tool box to where this switch was. It took me 10 or 12 minutes to walk from the tool box this half mile to the switch stand. When I got to the switch stand I stayed there a minute to two minutes, then went on to the east. Was not back at the switch stand any more. It was 10 or 15 minutes after 1 o'clock when I inspected this switch stand. I then went around the "Y" at the right of that switch and followed up the "Y" to the east to the yard limits, a mile and a half. I don't know how many switches there were between these two points, 15 or 11, I think. I don't know. I then came back in the yard. It took me to go this mile and a half and examine the switch points, or the switches and the track and other things, which I examined, twenty minutes or twenty-five. There were six or eight switch points between the tool box where I started in the afternoon, and this switch where the derailment took place. I do not remember how many switches there were between the tool box down the main line to this switch. (Trans. 168-170.)

After the word "moved" in line 12 on page 38 of appellant's abstract, the following has been omitted from the direct examination of the witness C. G. Becker:

"In using that as a storage track it was used from both the north and south ends to a certain extent. It is according to what
112 you want to get at and where it was you had to go; that was the main thing."

Q. You will observe the other storage track there leading off the "Y" which has been spoken of as a blind storage track, and as we understand a track that does not connect with the main line except as it would connect through the "Y"?

A. Through the "Y" is the only way, yes sir. (Trans. 200.)

After the word "turn" in line 6, page 36 in the direct examination of the witness Becker, should be inserted the following:

Q. You say it was about three days before the accident that you made this movement with this switch engine?

A. Somewheres two or three days, yes. It was after I had the engine. (Trans. p. 203.)

After the word "days" in line 15 on page 39 of appellant's abstract the following words should be inserted from the cross examination of witness Becker:

"Or a week maybe. I don't know just how long it was." I don't know as I said three days before the accident. I said three or four days." (Trans. p. 204.)

After the word "track" in line 23, page 39, the following has been omitted from the cross examination of the witness Becker:

"We had no work to do down on the track running parallel with the main line unless we were after some of those cars. Every car that was taken down there on that side track was taken there with a switch engine. Every car that was moved off out of that side track in the vicinity of this switch was not moved out by my engine. The night engine works there nights. The night engine probably did that, and then there was other engines. All the cars that were taken in and out of the track running parallel with the main track at this switch were taken there and taken away by switching crews.
113 That track is somewhere between a quarter and a half mile long, or between 1300 and 2600 feet." (Trans. 206.)

After the word "time" in line 25 on page 39 of appellant's abstract, the following should be inserted from the cross examination of the witness Becker:

"They were shop cars. I don't know as I ever put in on that track loaded coal cars, and don't remember seeing any coal down in there. There were coal cars on there, but I never noticed any loads of coal there. (Trans. 207.)

The words "at all" in line 30, page 39 of appellant's abstract should be stricken out and the following inserted in lieu thereof:

"All the time." (Trans. p. 209.)

After the word "cars" where it first appears in line 33 on page 39 of appellant's abstract, should be inserted the following:

"The shop engine is an engine that worked at night." (Trans. p. 209.)

At the end of the cross examination as printed upon page 40 of appellant's abstract, the following should be inserted:

"This track is known as the Linney spur. It is a storage track and is named after Jack Linney. He lives the first street west of the high switch and then down just a block south at the little tower house. These cars were being changed in and out on this track during all the time that I have worked in that vicinity, at different times, whenever they wanted them. When those cars were switched out from that track they would not always be pulled north out of the track over the switch on to this "Y" track and then bring them down the "Y" track on to the main line; as a general thing we would go up when we were switching them out for the shops, we would ride down there and get them and throw them on that lead, throw them down on this lead between there and the main line if there was room
114 enough. We would not push them over the switch on to the main line if there was room enough to load them on that little spur track between the switch track and the "Y" track. If there was not room enough there we would have to push them down over the main line." (Trans. p. 210.)

Q. They did that, they would push them right through this switch on to the main line?

A. I know they would push them through the switch. They would take and throw the switch.

I never seen it done both ways. It could be done and it would not

hurt the switch if they did, if they run right down through. (Trans. p. 211.)

When there were other cars in there they were often pulled back after they pulled them on the main line. They were pulled up the "Y" track and pushed back in on this track and were left.

If they shove the cars down, especially through the switch, if they happen to go through the switch they could pull them back up in there. When they pull them back up in there it would leave the switch thrown for the high line. That is the "Y" line. (Trans. p. 212.)

The night crew that worked in that vicinity at the time of the accident had a foreman by the name of Al Swem. I don't remember who was helping him at that time. The night crew went to work at seven in the evening and worked until seven in the morning. (Trans. p. 212.)

This night crew went with their switch engine in any part of the yard around the storage tracks. Their cars were stored all over the yards. These shop cars stored all over in different places in the yards. The yards are very extensive and the night engine would be going in these side tracks and select out a particular car there and switch out the cars ahead of it and get that car to take to the shops.

That was their business, and it was a common and nightly
115 practice for this crew during all the time I have been working for this company. I have worked on that crew. I went off that crew—when I left that crew I went to work with Reese. I had been working on that crew with Swem. I was on that crew pretty much all the summer of 1909. (Trans. p. 213.)

The night crew, after I quit, continued to do in the yard there the same class of switching that it did when I was a member of it. That work was covering the entire trackage in the yards and going into these storage tracks that I have pointed out and selecting out cars on those tracks to be repaired. If they came down there to this side track, which was immediately to the right of the main line at this switching going north, and drew out cars to take to the shops, they had to take them either of two ways; either up the "Y" track or up the main track. (Trans. p. 214.)

After I left the night crew and went onto the Reese crew I turned this passenger train around every day there. That was the only train, that is outside of the night trains. I guess they turn some coaches at nights. That was the only day train that was turned. There was a night train that came in in the same way up on the main track, a Des Moines train. I think a dining car that came up from Omaha is one that was turned at night. This switch was used at night and in the day time for turning trains. The only way by which you could turn trains or cars which were headed north so as to turn them and head them south was over this "Y" track, except you could take them to the round house and turn them with the turntable. The method employed in doing that work was to run them over the "Y" track. At times there are a good many extra passenger trains from the south. We hardly ever turned these unless

it was an observation car, or parlor car or mail car. They were turned. (Trans. p. 215-216.)

Cars from four side tracks there, when they were pulled off from this end, the night crew would come down over this "Y"
116 track and over this track at times and over the main line, according to the way they were after them, and also cars from this track at the right of the main line at the switch if they went down the main line after them and went in there. Maybe there would be times you would be down there two or three times a week and then maybe you would not be down there for a month or six months after that. I can't tell anything about what the night crew did when I was not with it. I am telling you what I personally know. (Trans. 219-220.)

The fact is, it is impossible for me to tell or remember where I was at any particular time I was in the yards because I was all over. There might be many switches made by my crew and the individual switches would escape my recollection. (Trans. 221.) I cannot tell what particular switches I made in this yard on that part of the yard where I worked, or what particular place I made them. I can't possibly remember that along the lead. (Trans. 222.)

At the end of the redirect examination as printed in line 15 on page 40 of appellant's abstract, the following has been omitted from the testimony of the witness Becker:

"Cars coming down the "Y" track could shove right down that track out on to the main line. They could go right down through the "Y" track on the main line. That could be when the switch was lined for the main line. If they were working there it would be lined according to which way they came in. If they went down the main line and went up in there after these cars it would be lined for the high line, but if they came down the other way, of course, unless they threw the switch, it would be lined for the main line. Assuming that the switch was lined for the main line, a car could not go off the "Y" and shove down on the main line without moving the switch. That is, if it went through the switch, went far enough to get on to the main line, it would have to go through the switch. (Trans. 223-224.)

117 The following has been omitted from the cross examination of the witness George D. Gibbons, there being but three lines printed of his cross examination at the top of page 46 of appellant's abstract:

Before I did switching I had worked in the shops and hadn't been switching before I commenced on the 19th day of March. (Trans. p. 247.)

To be exact, I could not say what passenger train I switched at seven o'clock in the morning, but that was generally our first job. I remember we did switching. I know there was a special car in there. It was a special car, a private car, some of the officials were using. I don't remember what one it was. We didn't switch it; just merely shoved it up for water. (Trans. p. 248.) I didn't know much about private cars. I didn't know what they were. I had been working in the back shops and I didn't understand what they were

and what they were used for. I had seen them I suppose. I didn't know anything about the care of them or what was supposed to be done with them. (Trans. p. 249.)

I cannot remember exactly the hour in the forenoon we switched this car. I don't remember that there was any other private car there. The next I recollect was getting hold of the coach and getting the doctors in it and going down to the derailment. (Trans. p. 250.)

The rest of the morning we were switching from the team track and spotting freight cars. I do not know the switches we made or the number of them, or where we got every one of the cars. We pulled some of them off the team track to the city track. We were spotting and switching cars all the forenoon of March 28th. (Trans. p. 252-253.)

We merely used the passenger track and scale track and team and city track and old coach track. (Trans. 254-255.)

I don't have any recollection what I did on the morning of the 27th after I went to work at seven o'clock. I remember turn-
118 ing passenger No. 4. (Trans. 255.) It being my duty to turn this car is all that causes me to remember that I turned it. What makes me remember the passenger work, being new at the switching business, when we got hold of the passenger equipment I thought that was a very tender proposition to get hold of, and I was more careful, seemed to be, and why I remember working the passenger work in preference to freight. (Trans. 256.)

The statement, "we look at all the switches before passing over them", printed in lines 13 and 14 on page 47 of appellant's abstract, in the cross examination of Walter H. Powell, is hardly a fair statement of the record. The following should be inserted after the word "them" in line 14 on page 47 of appellant's abstract:

Q. You don't recollect of looking at this particular switch as you passed by it, do you?

A. Well yes. Well I just don't remember the incident, but I know that we looked at all switches before we pass over them.

Q. I understand. There was nothing about this switch that attracted your attention one way or the other, and nothing about the other switches, of course you think you looked at all of the switches?

A. Yes, sir.

Q. But you haven't any recollection of looking at any particular one, have you?

A. No. (Trans. 269.)

The statement in lines 25 and 26 on page 31 of appellant's abstract, in the printing of the testimony of Walter H. Powell when recalled, is not a fair statement of the record. The witness stated that he didn't see any switching engine or crew out in the vicinity or any place around there. (Trans. 291.)

Appellant has printed only a part of the cross examination of the witness Walter H. Powell at the bottom of page 51 of its ab-
119 stract, when recalled. It omitted to print the following:

Q. You looked to see that the track you was going to use was clear, and the track you was going to use was the main track?

A. Yes, and there was nothing foul of it, no switch engine in sight or around.

Q. That is what I say, you were not looking at the side tracks to see whether there were other engines in there; you were looking at the main track to see whether there was anything in your way, is that right?

A. We was looking—of course we didn't notice nobody around there at all, no other switch engine.

Q. Do you remember whether you looked or not?

A. Oh yes.

Q. You remembered that as you was sitting over there?

A. Yes, I know we didn't see nobody down there.

Q. Do you remember now that as you went past this switch or as you approached this switch going into Oelwein that day that you looked all around there for trains and cars in the vicinity of this place, this switch?

A. Well I won't say we looked all around. We didn't see nobody.

Q. Well I suppose you didn't. You were not looking for anybody were you?

A. No, not out in the country no place nor anything like that. (Trans. 291-292.)

In addition to what has been printed upon page 53 of appellant's abstract, from the cross examination of the witness Earl F. Hatfield, the following should be inserted as additional cross examination:

"I was looking as we went up the tracks there to the left on that curve to see if there was anybody in our way. We had the right of way over this main line track. I had no difficulty in seeing
120 up the track where it turns on this side of the tracks on which these box cars appear in the picture, and saw no engine there, and then I looked up the track and did not see that the switch was open until we got within 200 feet of it, although I was looking at the track and up the track for about a quarter of a mile back of that point." (Trans. 300-301.)

The statement that the lock could be unlocked without a key, in line 20 on page 54 of appellant's abstract, at the end of the printed examination of the witness J. L. Ervin, is inaccurate. The following is the correct record:

Q. Now do you know whether that lock can be unlocked without a key?

A. Well, I think possibly it could be.

Q. Do you know whether it can be?

A. Yes, sir.

After the word "accident" in line 30 on page 54 of appellant's abstract, should be inserted the following from the cross examination of the witness J. L. Ervin:

"When I arrived the lock was hanging to the chain and the chain was attached to the switch stand,—to a sort of a staple, as shown in Exhibit "C." (Trans. 307.)

After the word "worn" in line 33 on page 54 of appellant's abstract, the following should be inserted:

"I took the lock and the spike and locked them up in a desk in the

office. They remained there most of the time. The office was moved a time or two. I could not say they were right in that specific desk all the time. When they were first placed in the drawer the office was at the lower or southeast end of the depot. It was moved after that to the north end of the depot. I think these articles were in there then. I could not say that I looked. I did not invoice the contents of the drawer. I had had it locked all the time. There might have been some other papers and stuff in the drawer besides the spike and lock. I didn't have any other locks. The desk was moved again up to the new yard office. Chief clerk had a key to
121 the drawer; nobody else that I know of. The chief clerk and I had access to the drawer. I didn't bring the spike. It evidently got out of there or something. I didn't take it out nor did I see the chief clerk take it out. I have a key which fits the lock. I opened the lock two or three times since. I examined the inside of the lock pretty close at the time. There appears to be slight marks there on the inside, and it appears to be a little bit polished and bright. These ridges don't appear to be freshly made. On the edges of them might be polished. Between the ridges it does not exactly appear to be fresh. This lock was not exposed to the weather while it was on the switch stand. (Trans. p. 311.)

I could not tell you whether the rains and snow would fall on the lock in the winter time, or that they would get ice in them. I never knew anything about that. In my investigations there in the yards I got no information upon this question. Never had any occasion to make any investigation at that time of the year. (Trans. 312.) The lock was opened at the time and maybe a few days afterwards. We examined it to see how it worked and one thing and another afterwards. I know this lock can be opened with a key because I opened it in the presence of the jury. I know also that it could be jerked open with the chain. I would have to have something to fasten it to, something solid like on a switch stand. (Trans. 313.)

After the word "accident" in line 3 on page 55 of appellant's abstract the following should be inserted:

Q. You had seen this done before that?

A. Why, I might have seen it on a few occasions, but it never was done in my presence, because that was part of my business, to report those cases, if they were doing those things without a key. (Trans. 315.)

I had heard that the employes in the yards were in the habit of pulling these locks open with the chain. (Trans. 315.)

122 After the word "that" in line 9, on page 55, of appellant's abstract, the following should be inserted as the recross examination of the witness:

"I saw no other chain about the switch stand there than what is on there (the lock). That possibly is not all the chain there was there. If I remember right it was wired on there with a piece of heavy wire to the staple. That piece was left on the switch stand. I could not say how much longer this chain was than it is now. It would not be very much longer." (Trans. 319.)

Q. Do you mean to say that the chain that you opened this with was that length and was attached here at this place?

A. It would not be attached to the next place there.

Q. The chain would be loose?

A. Yes, sir.

Q. You would put it in and pull it out like that?

A. Yes, sir.

Q. You don't mean to say that you have pulled it open with this chain attached to the lock?

A. No, sir. (Trans. 320.)

After the word, "them" in line 17 on page 55 of appellant's abstract, should be inserted the following:

"I could not tell you whether new locks of this same pattern could be jerked open." (Trans. 321.)

Q. But this lock you are sure on the 28th day of March, 1910, was in such a condition that you could pull it open like that? (Indicating.)

A. Yes, sir; right about that time. (Trans. 321.)

The plaintiff has omitted to print in lines 23 to 25 inclusive, on page 56, of its abstract, the date of the service of the original notice in this case, which the plaintiff offered in evidence as shown in said lines, but the date of the service has been omitted. The return of the sheriff in the original notice in this case, and which was offered in evidence, shows that the original notice came into his hand on the 20th of April, 1911, and on the 20th of April, 1911, it was personally served on the defendant in Polk County, Iowa.

Certificate.

We hereby certify that the above and foregoing abstract, together with the abstract of the appellant, constitute a full, true and correct abstract of the record of the trial of this case and that the two abstracts contain all the evidence offered and all the evidence introduced, together with all objections, rulings and exceptions thereto, and fully set forth the pleadings, bill of exceptions, exhibits, instructions, verdict, motion for new trial, judgment, appeal and all other matters of record in this case.

CLARK, BYERS & HUTCHINSON and
THOS. A. CHEESHIRE,
Attorneys for Appellee.

We certify that the cost of printing the foregoing abstract is $18.20.

CLARK, BYERS & HUTCHINSON and
THOS. A. CHEESHIRE,
Attorneys for Appellee.

124 In the Supreme Court, September Term, 1915.

(Filed November 26th, 1915.)

182/30018.

L. W. Basham, *Administrator of the Estate of John J. Spellman, Deceased, Appellee,*

vs.

The Chicago & Great Western Railway Company, *Appellant.*

Appeal from Polk District Court.

Hon. C. A. Dudley, *Judge.*

Action at law to recover damages for the death of plaintiff's intestate. There was a trial to a jury and verdict and judgment for plaintiff. Defendant appeals.

Cady, Cady & Evans, *for Appellant.*
Clark, Ryan & Hutchinson and Thos. A. Clenhire, *for appellee.*

Weaver, *J.*:

The deceased was in the employ of the defendant railway company as a locomotive engineer and at the time of his death was operating an engine hauling a passenger train over defendant's line between Des Moines and Oelwein. On March 28, 1910, deceased left Des Moines with his train which was due to arrive at Oelwein at 2:30 P. M. Approaching Oelwein from that direction and about a half mile from the station is a switch for a track leading off from the main line into defendant's yards. At the time in question it is contended that this switch was unlocked and open sufficiently to break the connection with the rails upon the main line. There was no one then present at the switch and nothing to warn the deceased of the danger thus created unless it be in the position of the target. Evidently he did not discover the defect in time to stop, with the result that engine was derailed and overturned and the engineer so crushed that he died on the following day.

The issues as finally settled were as follows: Plaintiff
125 as the administrator of Spellman's estate alleges that the death of the intestate was caused by defendant's negligence in failing to maintain a reasonably safe track and in carelessly leaving the switch open, and he demands a recovery of damages for the benefit of the widow under the provision of the act of Congress providing for recovery in such cases where the deceased was engaged in the work of interstate commerce. The defendant denies the claim, says the engineer was himself guilty of negligence and that the right of action, if any, is barred by the statute of limitations. Further

reference to the pleadings will be made in a later paragraph of the opinion.

At the close of the testimony defendant's motion for a directed verdict was denied. The jury returned a verdict for damages in plaintiff's favor and a special finding to the effect that the switch had been left open by the employees and agents of the defendant.

Spellman was an experienced engineer and had been in the employ of the defendant for 22 years. At the time of his death he was about sixty-one years old; had been married about thirty-five years and was the father of three children all of whom survived him and had arrived at their majority. Prior to the bringing of this action the children, being all the heirs at law of the deceased, united in a writing by which they assigned and transferred to the widow any and all interest which they had in the estate of their father including therein all their right and interest in the claim for damages on account of his death.

Concerning the circumstances immediately attending the derailment of the engine it is conceded that the switch was unlocked and partly open causing the wheels to leave the track. The following cut is made from a photograph of the switch stand and its inspection will make clear the situation as developed by the testimony.

(Here follows photograph marked page 126.)

127 From the top of the stand arose a rod or staff only partially shown in the cut. At the top of the staff was a lamp for use at night and below the lamp a red arrow or pointer. When properly set for the main line the switch was held in place by an iron plunger at the lower end of the staff dropped into an opening of the frame or body of the stand. This opening was square in form and the plunger was squared to fit into it. A lever or handle was attached to the upper end of the plunger which lever when the switch was closed hung down upon the side of the stand. To work the switch the operator lifted the handle raising the plunger out of the socket then by swinging the lever horizontally the switch points or ends of the movable switch rails were carried around into connection with the main or side track as might be desired. The mechanism of the stand was so adjusted that when the switch was set for either line the plunger would fit into the socket but when lifted out it required a swing of ninety degrees of the lever to bring it into position for the other connection and allow the plunger to again fit the socket. When in position for either track the plunger being in the socket held the rails in connection but if the lever being lifted was swung to any extent less than ninety degrees, the plunger not being — position for the socket would rest on the top of the stand and could not effectually prevent movement of the switch points. The staff carrying the lamp and arrow was so attached to the stand as to turn with the horizontal movement of the lever and when the switch was fully opened for the side track the arrow signal stood at right angles to the main track and served as a warning to train men approaching on the main line, but when the switch was set for the main line the signal stood parallel with that line and was invisible to the train men. It should also be said that the switch stand was provided with a padlock by which, when not in use or unattended by a switchman, the lever
128 could be secured to the side of the stand as a protection against interference or misuse by unauthorized persons. It is obvious from the foregoing statement that if, as both parties seem to concede, the switch was unlocked and the plunger lifted and resting out of place the warning signal would not be fully displayed to the main track—the obscurity being in proportion to nearness of the lever to the main track connection. It was the opinion of railroad men expressed on the trial that the plunger when in place, even though unlocked, could not be thrown out of the socket by the jar or vibration of passing trains, but it would seem clear to the non-expert mind that if the plunger was out and resting on the top of the stand when the engine was wrecked, the extent of the opening or displacement as found by the witnesses after the wreck occurred would not necessarily indicate the exact position of the switch points when the engine struck them. In other words, assuming that the switch was partly open and freed from the restraining effect of the plunger when in place, it would appear quite possible that the extent of the disconnection and displacement of the switch points may have been materially increased or diminished by the impact of the engine as it struck and passed over the defect in the track. This feature of the situation was material in its bearing upon the circumstance to which we shall again

refer that another engine had passed this switch in safety but a short time before the accident. It is also to be considered as bearing upon the extent to which the danger signal was displayed and therefore upon the question whether the deceased was in the exercise of due care. The fireman who alone was with the deceased at the time of the accident says that as they approached the switch at a distance of about two hundred feet he discovered something wrong with the target and called the attention of the engineer who looked and applied the air brake but too late to make the needed stop. He says "the rail was what I took to be half and half—the switch was lined up
129 for neither one or the other."

I. Such being the admittedly defective condition of the place at the time deceased arrived with his train we have first to ask whether there is evidence to take the case to the jury upon the question of the defendant's alleged negligence. That such evidence does appear we have no doubt. Even if we should disregard matters of fact upon which there is a conflict in the evidence, the circumstances upon which there is no dispute—that the switch, upon the proper placement and maintenance of which depended the safety of every passing train, was in the exclusive charge and control of the defendant and its agents; that it stood unattended, unlocked and open in a position to create a death trap into which an approaching train freighted with living persons was liable to plunge; that the intestate's engine was in this manner derailed and he himself fatally injured; that accidents of this nature do not ordinarily occur if due care be used by the railway company, its agents and employes; and that defendant was in duty bound to exercise all reasonable care to furnish a safe track over which to operate its engines—make up a record from which a jury may properly draw an inference that there was a breach of defendant's duty in this respect. In other words it makes a case for the application of the maxim Res ipsa loquitur as the same is now generally understood and applied and constitutes a prima facie showing sufficient to sustain a verdict in plaintiff's favor. This rule is entirely consistent with the fundamental proposition of the law of negligence that in order to recover on account of the want of due care on the part of a defendant the plaintiff assumes the burden of proof and that proof of the mere fact of his injury is insufficient to sustain a finding in his favor. In all cases he must offer competent evidence from which the jury may fairly and justly find the defendant wanting in the proper measure of care. This he is not required to do by direct positive evidence of eye-witnesses to the alleged
130 negligent act but it is sufficient to make a case for the jury on *the* this question if he shows facts from which a reasonable inference of the alleged negligence may be drawn. "If the facts proved make it probable that the defendant neglected its duty it is for the jury to decide between them."

Greenleaf vs. R. R. Co., 29 Iowa 46.

Res ipsa loquitur does not release the plaintiff from proving his case but defines in a general way one mode of proving it and what shall be prima facie evidence of negligence.

2 Labatt's Master & Servant, 1st ed. sec. 834.

The following statement of the rule by the Vermont court is quite clear and satisfactory: "Where an accident has occurred and the physical facts surrounding it are such as to create a reasonable probability that it was the result of negligence, in such case the physical facts themselves are evidential and furnish what the law calls evidence of negligence in conformity with the maxim Res ipsa loquitur."

Houston vs. Brush, 66 Vt. 331.

A leading text writer puts it as follows: "Though it is not every accident that will warrant an inference of negligence yet it is not true that no accident will suffice for that purpose. If the plaintiff proves that he has been injured by an act of the defendant of such a nature that in similar cases where due care had been taken no injury has been known to ensue he raises a presumption against the defendant which the latter must overcome by evidence either of his carefulness in the performance of the act or of some unusual circumstance with which he had nothing to do."

Sherman & Redfield on Negligence (2nd ed.) secs. 13, 59.

Frequently it is stated as follows: If the plaintiff being in his rightful place and in the exercise of due care is injured by reason of some defect in the condition or management of some instrumentality which is in the exclusive possession and control of defendant
131 and the accident is such as in the ordinary course of events does not happen if reasonable care is used to prevent it such showing affords sufficient evidence to justify a jury in finding that the injury was caused by defendant's negligence.

Tuttle vs. R. R. Co., 48 Iowa 239;
Grant vs. R. R. Co., 108 N. C. 462;
Scott vs. Docks Co., 3 Hurst & C. 596;
Breen vs. R. R. Co., 109 N. Y. 297;
Bahr vs. Lombard, 53 N. J. L. 233.

That the case at bar comes well within the scope of this rule is quite self-evident. The defendant's track and switches are part of its equipment for the more or less constant movement of heavy engines and trains. They are instrumentalities peculiarly within its control and under its management calling for unwearying and vigilant attention and supervision. While switches are in a very material sense always danger points yet common observation teaches us that when they are properly operated and cared for engines and trains ordinarily pass over them in safety. When, therefore, it is shown that the switch here in question was in fact misplaced and unattended at a time when the train pulled by intestate's engine was due to arrive we see no escape from the conclusion that, in the language of the English court, "it affords reasonable evidence in the absence of explanation by the defendants that the accident arose from want of due care."

Scott vs. Docks Co., supra.

In principle quite like the case at bar is Jones vs. R. R. Co., 178 Mo. 528; 77 S. W. 890. There a locomotive engineer was killed in a collision between his engine and a freight car which had been left standing on a side track but had in some manner escaped and moved out upon the main line over which the train of the deceased was rightfully operated. In sustaining a recovery of damages although the defendant sought to show the exercise of due care on its part the court says, "It is not a usual and ordinary occurrence in a prudently managed business for cars to be found
132 running loose in that manner, it does not ordinarily occur unless some one has neglected his duty and it is not therefore a risk assumed by the servant. And since it is not likely to happen in the orderly course of business, when it does happen and a servant is injured in consequence it calls for an explanation."

In Edgerton vs. R. R. Co., 39 N. Y. 227, Mr. Justice Grover says, "Whenever a car or train leaves the track it proves that either the track or machinery or some portion thereof is not in proper condition or that the machinery is not properly operated and persumptively proves that the defendant whose duty it is to keep the track and machinery in proper condition and to operate it with the necessary prudence and care has in some respect violated his duty." It is probable that this statement literally construed is a little stronger or more unqualified than the precedents generally will justify but it embodies the essential principle.

The cases cited sufficiently illustrate the general nature and effect of the rule. In a few jurisdictions there has been a disposition to restrict its application to cases between passengers and carrier and deny its application as between master and servant, but the better and much the greater weight of modern authority, while in some degree narrowing the scope of the rule in the latter instance, does not deny its applicability in favor of the servant in a proper case.

Huggard vs. Glucose Works, 132 Iowa 724;
Winkelman vs. Drug Co., 88 Md. 78;
R. R. Co. vs. Campbell, 111 Ill. App. 356;
McCray vs. R. R. Co., 89 Tex. 168;
Folk vs. Schaeffer, 186 Pa. 253;
Jones vs. R. R. Co. 178 Mo. 543;
Samuels vs. McKisson, 99 N. Y. S. 294;
Coleman vs. Foundry, 168 Mass. 254;
Houston vs. Brush, 66 Vt. 331;
Droney vs. Doherty, 186 Mass. 547;
Wright vs. R. R. Co., 127 N. C. 227;
Griffin vs. R. R. Co, 148 Mass. 143;
Graham vs. Badger, 164 Mass. 42;
133 Rose vs. Stephens, 11 Fed. 438;
How vs. R. R. Co., 30 Wash. 569;
La Fermier vs. Wrecking Co., 129 Mich. 596;
Cox vs. Gas Co., 17 R. I. 199;
McLean vs. R. R. Co., 137 Mich. 582;
Cahill vs. R. R. Co., 148 Iowa 241;
Riley vs. Co., 82 Neb. 319;
Lipsky vs. Coal Co., 136 Wis. 307.

Indeed it may be said now to be quite generally held that the application of the principle embodied in the res ipsa maxim does not depend upon the relation between the parties whether contractual or otherwise except so far as that relation defines the measure of duty imposed by law on the defendant.

Marceau vs. R. R. Co., (N. Y.) 105 N. E. 206;
Griffen vs. Maurice, 166 N. Y. 188;
Cooley on Torts, 799.

It may also be said in this connection that the principal reason formerly advanced in support of the argument against the application of the maxim in favor of a servant against his master was that the negligence, if any could be presumed, was as likely to be that of a fellow-servant as of a master, but where, as in this state, the fellow-servant rule has been abolished in favor of those employed in operating a railway the force of the argument for such restriction is correspondingly lessened. We do not overlook the Bloomfiled case, 107 Iowa 254, the O'Connor case, 83 Iowa 105; the Helgeson case, 148 Iowa 587, and others of that class. None of these cases is inconsistent with the foregoing discussion. None undertakes to say more than that in all cases where a servant charges his master with negligence the burden is always upon him to make good by a preponderance of evidence and that mere proof of the accident with nothing more is insufficient for that purpose. To that proposition we still give our unqualified adherence. If however, to the happening of the accident and injury is added evidence that it was attended with circumstances fairly justifying the inference that it would not have occurred had defendant been exercising due care to maintain a safe track and protect the lives of trainmen thereon then under the rule we here approve plaintiff has made a
134 case for the jury on the issue of negligence. Indeed as construed and applied by the New York court this is the extent of the res ipsa doctrine.

Griffen vs. Maurice 166 N. Y. 188;
Marceau vs. R. R. Co., 105 N. E. 207.

In the last cited case the court says of the maxim, "It is merely a sort of way of saying that the circumstances attendant upon the accident are themselves of such a character as to justify the conclusion that it was caused by negligence. The inference of negligence is deducible not from the mere happening of the accident but from the attendant circumstances." The action in that case was by a locomotive fireman for an injury from a sudden expulsion of hot water from the boiler into the cab where plaintiff was at work. In sustaining a recovery the court further says, quoting with approval from a former decision, 109 N. Y. 297, "There must be reasonable evidence of negligence, but when the thing causing the injury is shown to be under the control of the defendant and the accident is such as in the ordinary course of business does not happen if reasonable care be used it does, in the absence of explanation by the defendant, afford sufficient evidence that the accident

arose from want of due care on its part." There is nothing in any of our cases to which this proposition runs counter. It is possible that the res ipsa doctrine when applied to cases between carrier and passenger has been carried in come instances to the extreme limit of holding proof of the mere fact of accident or injury sufficient without more to put the carrier upon its defense, but without in any way criticising such precedents we need not go further here than to say that in its application to cases between master and servant the statement of the rule by the New York and many other courts, including our own as hereinbefore pointed out, seems to be just in principle and well supported in precedent. We therefore hold as already indicated that the testimony offered in his behalf
135 made a prima facie case for the plaintiff.

This prima facie case being made it was incumbent upon the defendant to rebut either by disproof of the facts testified to by plaintiff's witnesses or by such reasonable explanation as would relieve itself from any presumption or inference of want of due care. Was this done? The question thus presented was also for the jury. Precedents may be found where courts have assumed to hold that an employer's rebuttal in such cases is sufficient as a matter of law to overcome plaintiff's prima facie case but it must be a very unusual case to justify such an interference with the functions of a jury. The contrary rule is thoroughly well established. It is true that defendant put upon the stand some of its servants and employes working in and about its yards at Oelwein and they testified in substance that they had been diligent in looking after the tracks and switches, that the switch in question had been generally been kept closed and that they did not know how it became misplaced. They also showed that but a short time before the accident a lone engine had been run over the same track in safety and without disclosing anything wrong with the switch. Upon this showing it is contended as a matter of law that a verdict should have been directed for the defendant and that a new trial should be *no* granted. For reasons just stated we cannot so hold. The question thus presented was recently before the court of appeals of the District of Columbia. Plaintiff having made a prima facie case under the res ipsa doctrine defendant introduced witnesses to show that the injury complained of was purely accidental and that there was no lack of proper care. Upon the question whether the explanation was sufficient to exonerate the defendant the court says, "Assuming that the defendant's explanation if well founded in fact was sufficient to rebut the presumption of negligence, yet the question remains whether it was well founded in fact. Now it is not for the court to determine the truth of the explanation
136 given; that is peculiarly the province of the jury. * * *

It does not follow that because an explanation is sufficient in law it is therefore true nor does it follow that because it is true it is sufficient to exonerate the defendant. The explanation may be true as far as it goes and yet may not be sufficient to overcome the presumption of negligence raised from the circumstances of the accident. The case is not one of uncontroverted testimony on one

side and no testimony on the other side. It is a case of testimony of circumstances on one side from which negligence may be inferred and testimony on the other side from which it may be inferred that there was no negligence. This undoubtedly makes a case for submission to the jury."

Kohner vs. Traction Co., 22 App. D. C. 181.

To the same effect is Seybot vs. R. R. Co., 95 N. Y. 564. There the deceased was killed by reason of a switch being misplaced sending the train into a collision on a side track. In an action for the recovery of damages the administrator proved the circumstances of the accident making a prima facie case substantially as was done in this case. The defendant thereupon introduced numerous witnesses to show its careful and skillful management, the sufficiency of its equipment and its proper care and inspection, and sought to show that the wreck was caused by a broken axle concerning which it had exercised due care. The court after describing the wreck says, "These circumstances afforded a strong presumption that the train was diverted from the main track by some disarrangement of the switch. No adequate cause for the various circumstances appeared in evidence except that afforded by the presumption of a misplaced switch. Notwithstanding the positive evidence of witnesses to the effect that at different times during the few hours pre-
137 ceeding the accident they had examined the switches and found them properly set and locked, there was sufficient evidence derivable from the undisputed facts and the conflicting statements as to the situation of the connecting rails of the side track after the accident, to afford support for the inference probably drawn by the jury. So too in Wisconsin where the maxim Res ipsa loquitur has at times been given only hesiating recognition we find an interesting discussion by Dodge, J. of the effect of the defendant's evidence in rebuttal of the inference of negligence; (See Lipsky vs. Coal Co., 117 N. W. 803.) The court here sums up its view in these words, "The inference of negligence which in a proper case may be drawn from the accident itself is one of fact and the authority of the jury to decide whether it should be drawn can be excluded only in the presence of undisputed proof—not merely testimony—that such negligence did not occur." In Volkmar vs. R. R. Co., 134 N. Y. 418, a case involving the same question, the defendant having by its employes given evidence of due care the court in refusing to hold the conclusiveness of this showing makes use of this language which we deem very pertinent to the case before us; "But even if this evidence was sufficient to remove the presumption as held by the general term, the credibility of the witness was still involved and would be a question for the jury. This witness was defendant's track walker. It was his duty to examine the bolt which was broken. If there was any negligence with which the defendant was chargeable it was that of this witness. He was therefore a person interested and possibly actuated by a motive to shield himself from blame." The case of Mullen vs. St. John, 57 N. Y. 567, is also in point. There the trial court after intructing the jury in accordance with

the res ipsa doctrine and the sufficiency of such showing in the absence of explanation by the defendant, added that, "it is for the jury to say under all the circumstances whether that ex-
138 planation on the part of defendants is reasonably made." On appeal the instruction was held correct. Following in the same line is Rose vs. Ry. Co., 121 Minn. 363. In that case the plaintiff was injured by reason of the breaking of the air brake hose the effect of which was to stop the moving train very suddenly. There was some evidence also of the existence of a defect in the hose. The court says the evidence in this respect was not strong but adds, "Whether all this evidence was, standing alone, sufficient to take the issue to the jury we need not determine. We are clear the rule of Res ipsa loquitur applies and, aided thereby, the conclusion of the jury is sufficiently supported." There also, as in this case, the defendant offered evidence of its care, oversight, tests and inspection tending to rebut the inference of negligence on its part, and it was held that on the evidence "the questions whether the tests made were sufficient and adequate for the purposes of safety was one of fact for the jury." Other cases holding to the same rule or having the same trend are very numerous.

But even if we were to hold that the showing in rebuttal of the inference of negligence may be made so clear and strong that the court will say as a matter of law that plaintiff's prima facie case has been overcome we should still be compelled to say that the defense in this case is not of that conclusive character. The evidence tends to show that defendant's yards at Oelwein are quite extensive covering a large area of ground with side tracks aggregating over forty miles in length upon which there are scores of switches for the convenience of the net work of tracks. The switch in question is at the extreme southern border of the yards and would seem to be used less frequently than many of those farther north. Employed upon the yards are four switching crews of five men each. The section foreman at that point has a hundred or more men under his management. A key fitting all the switch locks appears to have
139 been generally carried by switchmen and trackmen and there is some testimony tending to show that other employes were so furnished. The witnesses for the defense were its superintendent in charge who described the general location and character of the yards and to his inspection of the switch after the accident. He says that generally the switch was opened and used about twice in twenty four hours, once for the purpose of turning or reversing the train on which the deceased was employed and again for a similar service during the night. He also says that about fifteen minutes before the accident another engine coming from that direction arrived at the station. He did not see or make any inspection of the switch before the accident. The section foreman also testified that he and his crew had no work in that vicinity on the day in question and neither locked or unlocked the switch. A trackwalker was employed under this foreman's supervision whose duty it was to go over the track, inspect its condition and make report thereon and on this day the trackwalker was on duty. The trackwalker being

then examined as a witness said he walked the track that day and passed the switch about an hour before the accident and observed it as he passed and that "it was lined up right for the main line." He does not say that he stopped in his walk for that purpose but appears to have satisfied himself by a glance as he walked south between the rails and back again on the north side of the track. He says, "I did not go over to the switch" buts adds that he noticed the lock was in the "eye" made for that purpose. Three of the foremen of the switch crews testified, each saying in substance that their work was principally at a distance from this switch and that neither he nor any of his crew were near or had anything to do with it during the twenty-four hours preceding the accident. The foreman of the crew who used this track for turning passenger trains says he used it for the last time on the preceding afternoon and that neither
140 he nor any of his men left it open. Other witnesses used were examined as to other matters—none of them having any knowledge of the condition of the switch until after the wreck occurred unless we except the fireman who brought the lone engine in from the south over this track a quarter of an hour before deceased arrived with his train. This witness says little more than that he was at his place on the engine and adds "We went over the switch all right and noticed nothing particular about it. There was nothing about this switch that attracted my attention one way or the other. We look at all switches before passing over them. We were running about ten miles an hour." No witness connected with the service says the switch was locked or had been locked since it was admittedly used twenty-four hours before. Gibbons, the foreman who used it on the preceding afternoon and who is the last man who admits having used it prior to the wreck says no more than "I did not leave the switch open nor did any member of our crew leave it open." The track walker who was the only one testifying who had opportunity to inspect the switch says that when he passed it it was lined up all right for the main line. This may have been true and the switch have been unlocked. The most favorable construction which can be put upon his testimony with reference to the lock is that as he passed he saw the lock with its ring hanging in the eye—but that is the very position in which it was found after the wreck when the switch was admittedly unlocked and misplaced. There is no showing of any order or rule of the defendant requiring it to be locked or kept locked. The most that appears in this respect is by the foreman under whom the trackwalker worked and the extent of his affirmation is that "We generally kept the main line switches locked. Did not lock the branch switches at all." There was no evidence tending to show that any unauthorized or evil disposed persons were seen at or about the switch. The only persons
141 known to have been in or about the yard and switch were the agents and employes of the defendant having the premises in its exclusive control and bound to all reasonable diligence in keeping them in a safe condition. Under these circumstances and the law as we have defined it the plaintiff was not required to negative by direct or affirmative evidence the possibility that the switch was

opened by a trespasser. If the circumstances were such, and we hold they were, as would justify the inference that the negligence was that of the defendant or its employes rather than by the influence of some other person unknown it was sufficient for plaintiff's prima facie case.

In this connection we may notice the circumstance very largely relied upon by defendant that the train which was wrecked had been preceded by a lone engine which passed the switch in safety. The fact affords a legitimate argument in support of defendant's contention that the switch must have opened within the last quarter of an hour preceding the approach of the train. But such inference does not appear to us by any means conclusive. Referring to the description of the switch stand it is manifest that if the plunger were lifted from the socket a very slight movement of the lever would leave it resting on the top with no effective restraint to hold the switch points in place. Now if there was no hard and fast rule requiring the switch to be locked (and this is a fair inference) it was easily possible for the last employe of the defendant using the switch and having finished the work to hastily swing back the lever as he supposed into place for the plunger to work then drop the lever and hasten away after his car without attempting to lock it, believing in good faith that the switch was safely closed when in fact the plunger, missing the socket, rested on top of the stand leaving the movable rails without any effective restraint to hold them in place. The closer the plunger to the socket the closer the switch points would be to the fixed rail, the less apparent the danger but the more
142 likely that a passing engine might pass over the switch without derailment. If left in this condition it would seem to a reader of the record by no means impossible that the lone engine might have passed the switch in safety and yet by its movement or by the jar or vibration resulting therefrom caused the unfastened switch points to move further away from the rail and render the passage of the later train much more perilous. Of course in saying this the court does not undertake to find the fact and we mention it only as illustrating the unsoundness of defendant's insistence that it is shown beyond question the switch was closed and locked when the engine passed. On the contrary we think the jury was justified in finding that the unfastened condition of the switch had continued a much longer period. We therefore hold the trial court did not err in refusing to hold as a matter of law that there was no evidence on which the jury could find the defendant negligent.

II. Exceptions were preserved to the admission of certain testimony concerning the giving out switch keys by defendant to its employes because it is said the witness testifying referred to a time three years before the accident. Whatever of technical merit there may have been in this objection appears to have been minimized and rendered harmless by the concession by the defendant's witnesses as to the practice prevailing at the time of the accident. It is also complained that this kind of evidence or some of it was drawn out of defendant's witnesses on cross-examination. So long as the evidence is pertinent to the issue being tried, it required a grave

abuse of the trial court's discretion in admitting the same on cross-examination to justify a reversal of the judgment appealed from. We cannot conceive that defendant suffered any material prejudice in this instance.

III. It is further contended by appellant that Plaintiff's
143 right of action is barred by the statute of limitations. The deceased received the injury of which he died March 27, 1910. The original petition was filed April 21, 1911. It described the defendant company as operating a line of Railway throughout the states of Iowa, Illinois, Minnesota, Missouri and Kansas, and alleges that the deceased was injured while operating an engine hauling a regular passenger train from Des Moines to Oelwein and alleged resulting injury to his estate. To this the defendant demurred on the ground that the petition shows the deceased to have been engaged in interstate commerce, that no recoverable damages resulted to his estate and no action would lie therefor under the laws of the state of Iowa. It was further objected that under the facts stated no right of action for damages survived his death. The demurrer being overruled the defendant answered in denial and pleading contributory negligence of the deceased. On October 13, 1913, plaintiff amended his petition alleging that the deceased left surviving him a widow to whom in his life time he contributed all his earnings, and stating that the action was brought for the widow's benefit. He also withdrew the prior allegation of damage to the estate. Thereupon defendant filed a motion to strike the amendment to the petition because (1) it was filed without leave and without notice; (2) it sets up a new and independent cause of action and was filed too late; and (3) the right of action so pleaded is barred by the statute of limitations. This motion was overruled and defendant filed a substituted answer denying the petition as amended, alleging the contributory negligence of the deceased and pleading the statute of limitations. There was no motion in arrest of judgment after verdict.

Assuming that the defense is properly pleaded we are of the opinion that it is not well founded. It is true that in its original form the petition indicates an uncertainty in the mind of the pleader
144 whether plaintiff's right of recovery was under the law of the state or the federal statute and that it was drawn with the thought of making its allegations broad enough to give the action standing upon either theory. That it did allege sufficient facts to indicate that deceased met his death while engaged in interstate commerce we think is quite apparent. Such too must have been the view of defendant's counsel when they demurred to the petition on that ground. That demurrer raised no question of the necessity of alleging that deceased left a family or relatives dependent upon him, nor indeed was that objection raised at any time by answer, motion or demurrer. Neither was any objection made or exception taken on the trial to plaintiff's evidence concerning the family of the deceased or of her dependency upon her husband in his life time, or the extent of his contributions to her support. Nor was such objection made a ground for the motion to direct a verdict. The first time

that point was made appears in the motion for new trial, and this in our opinion was too late even though it might have had merit if raised in time. Without extending this opinion, perhaps already too voluminous, we think it sufficient to say that the precedents permitting amendments to petitions in actions of this general nature more than two years after the occurrence of the injury sifficiently support the ruling of the trial court. See

R. R. Co. vs. Wulf, 226 U. S. 570;
Bixler vs. R. R. Co., 201 Fed. 553;

See also

210 Fed. 761; Cin. etc. Ry. Co. vs. Goode (Ky.) 173 S. W. 329;
Benson vs. Ottumwa, 143 Iowa 349;
Gordon vs. R. R. Co., 129 Iowa 741;
Cahill vs. R. R. Co., 137 Iowa 557;
Woods vs. Lisbon, 138 Iowa 402;
R. R. Co. vs. Didrickson, 227 U. S. 145.

IV. Counsel argue that deceased was guilty of contributory negligence as a matter of law. There is no merit in this contention. The evidence shows that both fireman and engineer were maintaining the usual lookout, that nothing wrong in the appearance of the
145 switch attracted their attention until they were within 200 feet of it and that their efforts to stop in time were then unavailing. It is conceded that even after the wreck took place the danger signal upon the switch post was only partially displayed and the jury could rightfully infer that this fact reasonably accounted for the failure of the engine men sooner to discover it. Moreover while it was their duty to maintain a proper lookout they had the right to believe the defendant and its servants were doing their duty in maintaining the track in a reasonably safe condition for their use and it is not for the court to say that reasonable care on their part required them to approach the switch prepared to stop instantly upon discovering their danger. Indeed had the jury affirmatively found the deceased negligent in this respect it would be difficult to find support therefor in the record.

V. Most of the assignments of error predicated upon instructions given and refused when tested by the rules of law affirmed in this opinion do not appear to have been well taken, and so far as any of them raise any questions than those already construed and passed upon we find the language used by the trial court is not open to the criticisms made against it.

VI. It is finally said that the verdict is excessive. Defendant was an experienced engineer earning $175 per month. He was a man in good health with an expectancy of life of thirteen and one half years. It was his practice to turn his wages over to his wife and he is not shown to have been a man of intemperate or wasteful habits. The wife was left a widow at 52 years of age, and the verdict in her favor was $11,150.00. As has often been said in cases of this nature there is no fixed or exact rule for measuring the value of a human

life or the damages resulting from its loss to the estate of the deceased or to his dependents who has been deprived of his support. Its estimate is peculiarly for the jury and the court should not interfere with it save where its extravagance is so great or so marked as to
146 clearly indicate passion or prejudice. The record here is not of that character and we cannot interfere with the verdict.

We find no error calling for a reversal of the judgment of the district court and it is therefore

Affirmed.

Deemer, C. J., Preston and Gaynor, JJ. concurring.

147 In the Supreme Court of Iowa, January Term, 1916.

#30018.

BASHAM, Adm'r, Appellee,

vs.

CHICAGO & GREAT WESTERN RY. CO., Appellant.

Appeal from Polk County District Court.

Hon. C. A. Dudley, Judge.

Supplemental Opinion.

(Filed April 7th, 1916.)

Per Curiam:

The opinion originally filed in this case is found in Vol. 154 N. W. Reporter, page 1019.

A petition for rehearing has been filed which is largely directed to the third paragraph of that opinion. Owing doubtless to our failure to express our views at that time with proper precision and clearness, counsel have wholly misapprehended the thought we intended to express; and in order to remove any doubt thereon, we withdraw the entire paragraph, and omitting all reference to technical questions of pleading and practice substitute a new paragraph dealing directly and solely with the point made by defendant that the cause of action stated by the amended petition is barred by the statute of limitations.

The deceased was injured March 27th, 1910; the original petition was filed April 11th, 1911. It described the defendant company as operating a line of railroad through the States of Iowa, Illinois, Minnesota, Missouri and Kansas and alleged that deceased was injured while in charge of an engine hauling a regular passenger train between Des Moines and Oelwein and demanded a recovery of damages. To this defendant demurred on the ground that the petition showed deceased to have been engaged in inter-state commerce and no action for the recovery of damages would lie under the laws of Iowa.

It was also objected that no right of action survived the death of the intestate. The demurrer being overruled, defendant answered in denial and pleaded contributory negligence on the part of
148 deceased. On October 13th, 1913, more than two years after the death, plaintiff amended the petition by adding an allegation that deceased left a dependent wife who suffered pecuniary injury by his death and that the action was being prosecuted for her benefit. Thereupon the defendant in a motion to strike raised the objection that the amended petition stated an entirely new cause of action and was barred. The motion was overruled and defendant answered denying the amended petition and pleading the statute of limitations. The facts bearing upon the issue so tendered are wholly without dispute and passing all merely collateral questions. we come at once to the inquiry whether this defense is available to the appellant.

3. We are of the opinion that the statute of limitations affords no defense in this case. The suit was originally brought and has ever since been maintained by the administrator who is the proper person to prosecute it whether it be maintainable under the law of the state or under the federal employers' liability act. The cause of action in either case is the death of Spellman occasioned by the alleged negligence of the defendant. In other words, whether the action be brought in one form or the other it is by the same party, against the same party in the same court, for damages for the same alleged wrong; the sole distinction being in the measure of damages to be recovered and the person or beneficiary to whom the plaintiff must account for the damages, if any, which he collects. Now assuming that plaintiff seeks to recover under the statute of the state and alleges a good cause of action, but before the case is brought to trial, or even pending the trial, it develops that the deceased was injured while engaged in interstate commerce and that, to sustain a verdict in favor of the administrator, the petition should allege that he was survived by a dependent wife or family, an amendment to the petition adding such necessary averment does not, in the judgment of the court, state a new cause of action permitting the defendant to successfully interpose a plea of the statute of limita-
149 tions. Such is the logical and necessary effect of our own holdings; Cahill vs. R. R. Co., 137 Iowa, 577; Benson vs. Ottumwa, 143 Iowa 349; Kuhns vs. R. R. Co., 76 Iowa 68; Myers vs. R. R. Co., 152 Iowa 330; Knight vs. Ry. Co. 160 Iowa 166; Padden vs. Clark, 124 Iowa 96. In the Cahill case and in many other cases it has been held that although a petition in a personal injury action is demurrable because of failure to make some material averment it may be amended even after the period of limitations has expired between the commencement of the action and the filing of the amendment. See also Myers vs. Kirt, 68 Iowa 124; Bacon vs. R. R. Co., 157 Iowa 501. In the Benson case the plaintiff, a minor, sought to recover damages resulting to himself for personal injuries. Later and after the expiration of the period in which the statute permitted such actions to be brought without previous notice to the city, he filed amendments increasing his claim among which was a claim for dam-

ages sustained by the father by loss of plaintiff's services, the same having been assigned to him by the parent. It was held that the statutory limitation did not apply, this court there saying that the tort suffered by the son having resulted in loss of earnings to which the parent would have been entitled, the negligence on which the action was predicated was nevertheless negligence in reference to the minor and "the question as to the person entitled to have compensation for such injury was merely incidental." Directly in point also seems to be the case of Knight vs. Ry. Co., 160 Iowa 160. There an action was brought to recover for the death of an intestate who was killed in Illinois where the right of recovery, if any, was for the benefit of the dependent's wife and children. The administrator brought action in this state claiming damages generally for the estate without alleging the exi-tence of dependent relatives entitled thereto. He was allowed to amend his petition even after verdict by adding thereto the necessary omitted averments without exposing the claim of the defense of the statute of limitations. It was
150 there distinctly held that the statute of limitations was arrested or tolled by the beginning of the action even though the petition as originally filed may have been demurrable. In this connection the court says, "The identity of the cause of action is not made to depend upon perfection of allegation nor is the identity changed by the filing of a mere amendment. Though the petition be demurrable that fact does not *life* the toll of the statute. It is true that this rule does not seem to be recognized in a few jurisdictions but it has the support of the weight of authority. R. R. Co. vs. McFadden, 89 Tex. 138; McKeighan vs. Hopkins, 19 Nebr. 33; Hillier vs. Donfas, 56 Kan. 97; Ross vs. State, 131 Ind. 548; Banking Co. vs. Smith, 83 Fed. 183; Doe vs. Littlefield, 99 Me. 317; Detroit vs. Hosmer, 125 Mich. 634. The Wisconsin court as recently as February 22nd of the present year had under consideration the question presented by this appeal; Curtice vs. Ry. Co. 156 N. W. 484. The plaintiff brought an action against a railway company to recover*y* damages for personal injury, his complaint being in the usual form for recovery under the law of that state. The defendant in answer alleged that the injury, if any, occurred while plaintiff as a servant of the company was engaged in a work of interstate commerce, wherefore the action under the law of the state should be abated. After this issue had bee- raised plaintiff was permitted to amend and alleged facts showing that at the time of his injury his employer was a common carrier engaged in interstate commerce and that he was then so engaged in its service. To this the defendant responded with a plea of the statute of limitations, and the plea being upheld by the trial court, the action was dismissed. On appeal the judgment below was reversed, Kerwin, J. writing the opinion for the majority. He says, "It is obvious that but one cause of action existed upon all the facts stated in the amended complaint. It is equally obvious that the original complaint was defective in failing to state certain facts going to show that at the time the injury
151 was sustained the parties were engaged in interstate commerce. Nothing stated in the amended complaint was in conflict with

the allegations of the original complaint. The cause of action upon which the plaintiff sought to recover damages was defectively stated in the original complaint and the defects were cured by the amendment. But one cause of action was stated. The amendment related back to the original complaint and became a part of it; hence the statute of limitation was no defense. Ry. Co. vs. Wulf, 226 U. S. 570; Cainesville M. R. vs. Vandiver, 141 Ga. 350; Bixler vs. R. R. Co., 201 Fed. 553; Smith vs. Ry. Co., 210 Fed. 761; Ry. Co. vs. Goode, 163 Ky. 60; Vickery vs. Ry. Co., 87 Conn. 634; Shiefflin vs. Whipple, 10 Wis. 81; Callahan vs. R. R. Co., 154 N. W. 449." The court further says:

"The learned trial judge below seems to have attached importance to the fact that counsel for appellant stated that he intended to state a cause of action under the state law. We think this statement wholly immaterial. The mental operations of counsel could not create two causes of action where but one existed. The intent of the pleader might be significant or helpful in giving construction to an allegation which was ambiguous or of doubtful meaning. But there is no such question here.

There is another feature of this case which is worthy of notice. When the defendant answered the original complaint it set up the facts which were omitted in the plaintiff's defective complaint and necessary to perfect the cause of action under the federal act, and which were afterwards set up by plaintiff in the amendment complained of. The defendant was therefore in no way surprised or prejudiced by the amendment. Doubtless the case could have gone to trial on the pleadings as originally framed, and the complaint on the trial amended or treated as amended in accordance with the issues made by the pleadings as originally framed. Callahan v. Chicago & N. W. Ry. Co. 154 N. W. 449; Bieri v. Fonger, 139
152 Wis. 150; Graber vs. Duluth S. S. & A. R. Co., 159 Wis. 414; Wabash R. R. v. Hayes, 234 U. S. 86.

In this connection we also call attention to the case of Vickery vs. Ry. Co., 89 Atl. 277, a recent decision by the Connecticut court. There also the defendant was allowed to amend to bring his action under the federal statute and it was held not to be a statement of a new cause of action. Our statute Code section 3600 is exceedingly liberal in its terms allowing a party in furtherance of justice to amend his pleadings or proceedings by correcting a mistake "in any respect" or by inserting "other allegations material to the case." It also allows him to amend his pleadings or proceeding even after proof is offered to conform them to the facts proved so long as he does not substantially change the claim or defense. That the amendment here considered does not introduce any new cause of action we think is abundantly sustained by the authorities.

In preparing this opinion for official publication, the Reporter of this Court will make the substitution of the third paragtaph as above indicated. As thus modified the opinion will stand and the petition for rehearing is

Overruled.

153 Be it remembered that on the 26th day of November, 1915, the following proceedings were had in the Supreme Court of Iowa, to-wit:

L. W. BASHAM, Administrator of the Estate of John Spellman, Deceased,

vs.

CHICAGO GREAT WESTERN RAILWAY CO., Appellant.

Appeal from Polk District Court.

In this cause the Court being fully advised in the premises, file their written opinion affirming the judgment of the District Court. It is therefore considered by the Court that the judgment of the court below be and it is hereby Affirmed and that a writ of procedendo issue accordingly.

It is further considered by the Court that the Appellant pay the costs of this appeal, taxed at $— and that execution issue therefor.

I hereby certify that the foregoing is a full, true and complete copy of the judgment entry of said Court in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 10th day of January, A. D. 1917.

[Seal of the Supreme Court of Iowa.]

B. W. GARRETT,
Clerk Supreme Court,
By J. V. ARNEY, *Deputy.*

154 Be it remembered that on the 7th day of April, 1916, the following proceedings were had in the Supreme Court of Iowa, to-wit:

30018.

L. W. BASHAM, Administrator of the Estate of John Spellman, Dec'd,

vs.

CHICAGO GREAT WESTERN RAILWAY COMPANY, Appellant.

Appeal from Polk District Court.

In this cause the Court being fully advised in the premises, file their written opinion Overruling the petition for rehearing. It is therefore considered by the Court that the petition for rehearing be and it is hereby Overruled, and that a writ of procedendo issue accordingly.

It is further considered by the Court that the Appellant pay the costs of this appeal, taxed at $— and that execution issue therefor.

I hereby certify that the foregoing is a full, true and complete copy of the judgment entry of said Court in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 10 day of January, A. D. 1917.

[Seal of the Supreme Court of Iowa.]

B. W. GARRETT,
Clerk Supreme Court,
By J. V. ARNEY, *Deputy.*

155 STATE OF IOWA, *ss:*

Supreme Court of Iowa.

Be it remembered, that on the 18th day of December, 1916, the following proceedings, among others, were had in the Supreme Court of Iowa, to-wit:

30018.

L. W. BASHAM, Adm'r.,

vs.

CHICAGO GREAT WESTERN RAIL ROAD COMPANY, Appellant.

Appeal from Polk District Court.

Appellant's Petition for Rehearing having been fully considered is Overruled.

I hereby certify that the foregoing is a full, true and complete copy of the record entry of said Court in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Des Moines, this 10th day of January, A. D. 1916.

[Seal of the Supreme Court of Iowa.]

B. W. GARRETT, *Clerk,*
By J. V. ARNEY, *Deputy.*

156 In the Supreme Court of the State of Iowa.

At Law.

#30018.

CHICAGO GREAT WESTERN RAILROAD COMPANY, Appellant (now Plaintiff in Error),

vs.

L. W. BASHAM, Administrator of the Estate of John J. Spellman, Deceased, Appellee (now Defendant in Error),

Petition for Writ of Error.

To the Honorable Chief Justice of the Supreme Court of Iowa:

Your petitioner, Chicago Great Western Railroad Company, respectfully shows that on the 18th day of December, 1916, the Supreme Court of Iowa entered a final order and judgment herein in favor of appellee, (now defendant in error), and against appellant, (now plaintiff in error), affirming the judgment rendered by the district court of Polk County, Iowa, in favor of appellee and against appellant for the sum of $11,150.00 with interest and costs, in which final order and judgment of the Supreme Court of Iowa and in the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of appellant, (now plaintiff in error), all of which will more in detail appear from the assignment of errors which is filed with this petition;

The said Supreme Court of Iowa is the highest court of said state of Iowa in which a decision in this suit and this matter could be had;

Plaintiff in error presents herewith an assignment of errors and a bond in proper form;

Wherefore, the Chicago Great Western Railroad Company petitions and prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of the State of Iowa, for the correction of errors so complained of,
157 and that a transcript of record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States, and that an order be entered staying all further proceedings in this court in this cause until the determination of said writ of error.

Dated this 19th day of December, A. D. 1916.

GEO. H. CARR,
FRED P. CARR,
DONALD EVANS,
O. M. BROCKETT,
Attorneys for Appellant, Chicago Great Western Railroad Company.

Writ of error allowed and stay granted this 20th day of December, 1916.

W. D. EVANS,
Chief Justice of the Supreme Court of Iowa.

[Endorsed:] 9. 30018. C. G. W. R. R. Co., App'l't, Pl't'f in Error, vs. L. W. Basham, Adm'r, Def't in Error. Polk D. C., Writ of Error to U. S. S. Court. Filed Dec. 21, 1916. B. W. Garrett, Clerk Supreme Court.

158 In the Supreme Court of the State of Iowa.

No. 30018. At Law.

CHICAGO GREAT WESTERN RAILROAD COMPANY, Appellant (now Plaintiff in Error),

vs.

L. W. BASHAM, Administrator of the Estate of John J. Spellman, Deceased, Appellee (now Defendant in Error).

Assignment of Errors and Prayer for Reversal.

Comes now the plaintiff in error, Chicago Great Western Railroad Company and respectfully submits that in the record proceedings, decision, and final judgment of the Supreme Court of the state of Iowa in the above entitled matter, there is manifest error in this, to-wit:

1.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of the Act of Congress, approved April 22, 1908, commonly known as the Employers' Liability Act (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, sec. 8657), as amended April 5, 1910, (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, sec. 8662), regulating the liability of common carriers en-
159 gaged in interstate commerce and the amendments thereto, in that said Supreme Court of Iowa by its rulings, judgment, and decision in this case refused to grant to this plaintiff in error a peremptory instruction to the jury to return a verdict in its favor; whereas, under said Act of Congress and amendments thereto this plaintiff in error was entitled both in the district court of Iowa in and for Polk County and in the Supreme Court of Iowa to a peremptory instruction in its favor.

2.

Because the Supreme Court of Iowa denied to the plaintiff in error a right, privilege, and immunity granted to it by a proper con-

struction and application of said Act of Congress of April 22, 1908, known as the Employers' Liability Act and amendments thereto, by refusing to hold that the district court of Polk County, Iowa, in the trial of said cause committed error in refusing to give the following instruction requested by the plaintiff in error (defendant in said district court) being Instruction No. 1 asked by defendant in said court, to-wit:

"Under the undisputed evidence, the plaintiff is not entitled to recover, and your verdict will be for the defendant."

3.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by refusing to hold that the district court of Polk County, Iowa, in the trial of said cause committed error in refusing to give the following instruction, being Instruction No. 4 asked by the defendant in said court (plaintiff in error here), as follows, to-wit:

160 "The court instructs you that there can be no recovery in this case for money which Mr. Spellman would have used for his own support; nor can there be any recovery for money which you find there was a reasonable expectancy he would have earned but which would not have been used by Mrs. Spellman for her own support or that of her children. There can be no recovery on account of money which you find Mr. Spellman would have earned but which was used by Mrs. Spellman in the support of her mother or other relatives who were not related to Spellman."

4.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by refusing to hold that the district court of Polk County, Iowa, in the trial of said cause committed error in refusing to give the following instruction requested by the defendant in that court (plaintiff in error here), which instruction is as follows, to-wit:

"The court instructs you that there can be no recovery in this case for money which Mr. Spellman would have used for his own support."

5.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by refusing to hold that the district court of Polk County, Iowa, in the trial of said cause, committed error

in refusing to give the following instruction requested by defendant in that court (plaintiff in error here) as follows, to-wit:

161 "There can be no recovery on account of money which you find Mr. Spellman would have earned but which was used by Mrs. Spellman in the support of her mother or other relatives who were not related to Spellman."

6.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by refusing to hold that the district court of Polk County, Iowa, erred in refusing to give the following instruction requested by the defendant in said court in said case (plaintiff in error here), as follows, to-wit:

"The evidence in this case fails to show what portion of Mr. Spellman's earnings would have been used in the support of Mrs. Spellman. In no event, therefore, can you allow the plaintiff more than nominal damages."

7.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding and deciding that notwithstanding this action was originally brought under the laws of the state of Iowa, amendments filed more than two years after the cause of action arose, claiming the right to recover under the Act of Congress called the Employers' Liability Act, did not state a new cause of action.

8.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding and deciding that the plea of the statute of limitations to the petition as amended did

162 not present a good defense.

9.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding and deciding that an amendment to the petition made after two years from the commencement of the action, changing the action from one under the state law to one under the Act of Congress, by which there was a departure from

law to law, was permissible, and that the petition as thus amended was not subject to the defense of the statute of limitations.

10.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by refusing to hold that the district court of Polk County, Iowa, in the trial of this cause committed error in refusing to give Instruction No. 2 asked by defendant in said court (plaintiff in error here) as follows, to-wit:

"The court instructs you that the cause of action set up by the plaintiff in his petition as amended is barred by the statute of limitations, and your verdict must therefore be for the defendant."

11.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding that the petition of the plaintiff (defendant in error here) filed on the 21st day of April,
163 1911, and the proceedings had prior thereto, arrested the running of the limitation period for the commencement of actions, contained in said act.

12.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding that the amendments to the petition filed by plaintiff (defendant in error here) more than two years after the death of said Spellman, which amendments were filed on and subsequent to the 13th day of October, 1913, did not state a new cause of action.

13.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding that the amendments filed more than two years after the death of said Spellman, which occurred on the 29th day of March, 1910, were mere amplifications of the original petition.

14.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construc-

tion and application of said Act of Congress, commonly called the Employers' Liability Act, by holding and deciding that the petition as amended, more than two years after the death of said Spellman, was not barred by the period of limitations for the commencement of actions, contained in said Act of Congress.

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15.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding and deciding that the defense of the statute of limitations was not well founded.

16.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by refusing to hold that the said district court of Polk County, Iowa, erred by not sustaining defendant's (plaintiff in error here) motion to direct a verdict at the close of plaintiff's evidence on the fourth and fifth grounds thereof, to-wit:

"4. The cause of action presented by the plaintiff's petition as amended is barred by the statute of limitations.

"5. It appears from the undisputed evidence that Mr. Spellman, plaintiff's decedent, died in March, 1910, and more than two years prior to the filing of the amendment to the petition, setting up the cause of action now set up by the petition as amended."

17.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, in not holding that the said district court of Polk County, Iowa, erred in overruling defendant's motion to direct a verdict at the close of all the evidence on the fifth ground thereof, to-wit:

"5. The cause of action set up in plaintiff's petition, as amended, is barred by the statute of limitations."

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18.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding and deciding that the said district court did not err in overruling defendant's motion to direct a verdict at the close of the plaintiff's evidence upon the following ground, to-wit:

"It appears from the undisputed evidence that Mr. Spellman survived the injuries which he received when the engine that he was driving was derailed, about twenty-four hours, and under the law as it then existed the right of action, if any, inured to him during his lifetime and did not survive his death."

19.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding and deciding that the fact of the derailment of the engine by reason of the open switch, raised a presumption of negligence on the part of the defendant.

20.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding and deciding that the evidence introduced by the plaintiff raised a presumption which was not, as a matter of law, overcome or removed by evidence on the part of the defendant.

21.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construc-
166 tion and application of said Act of Congress, commonly called the Employers' Liability Act, by holding and deciding that the doctrine res ipsa loquitur applies in an action between master and servant.

22.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding that the testimony introduced by the plaintiff was sufficient to take the case to the jury.

23.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding that the evidence as a whole was sufficient to sustain a verdict in favor of the plaintiff.

24.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and

application of said Act of Congress, commonly called the Employers' Liability Act, by holding that the said district court did not err in overruling the defendant's (plaintiff in error here) motion to direct a verdict at the close of plaintiff's testimony on the following ground, to-wit:

"1. The evidence fails to establish any negligence upon the part of the defendant."

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25.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding that the said district court did not err in overruling the defendant's (plaintiff in error here) motion to direct a verdict at the close of plaintiff's testimony on the following ground, to-wit:

"2. The evidence fails to establish any negligence upon the part of the defendant which is the proximate cause of the derailment in which the plaintiff's decedent was injured."

26.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding that the said district court did not err in overruling the defendant's (plaintiff in error here) motion to direct a verdict at the close of plaintiff's testimony on the following ground, to-wit.

"3. The evidence fails to show that the misplaced or open switch which it is claimed caused the derailment of the engine which plaintiff's decedent was running, was left open by an employe of the defendant company, or that it was in the condition it was in through any fault or negligence on the part of the defendant or any of its agents or employes."

27.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' liability Act, by holding that the said district court did not err in overruling defendant's motion to direct a verdict at the close of all the evidence upon the following ground, to-wit:

"1. The evidence fails to show that the defendant was guilty of the negligence charged in the petition."

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28.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and

application of said Act of Congress, commonly called the Employers' Liability Act, by holding that the said district court did not err in overruling defendant's motion to direct a verdict at the close of all the evidence upon the following ground, to-wit:

"2. The evidence fails to show that the derailment which resulted in the death of Mr. Spellman was the result of any fault or negligence on the part of the defendant."

29.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding that the said district court did not err in overruling defendant's motion to direct a verdict at the close of all the evidence upon the following ground, to-wit:

"3. The evidence affirmatively shows, without conflict, that the misplaced switch which caused the derailment of the engine, resulting in the death of Mr. Spellman, was not misplaced or opened, or permitted to be open, by the act of any person in the employ of the defendant company, or of any officer, agent, or employee of defendant company; and that said open switch was not due to any negligence on the part of the defendant or of any of its officers, agents or employees."

30.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding that the district court did not err
169 in refusing to give to the jury the following instruction requested by the defendant (plaintiff in error here) to-wit:

"It is not sufficient to entitle the plaintiff to recover, for him to show that defendant may have been guilty of the act of negligence charged in the petition. It is incumbent upon him to show by substantial evidence that some person acting for defendant, in the discharge of some duty imposed upon him by defendant, misplaced the switch which caused the accident. If the evidence leaves it uncertain whether some employe of defendant, or some unknown party, is responsible for the misplaced switch, the plaintiff cannot recover."

And the Supreme Court of Iowa erred in holding that the district court did not err in refusing to give said instruction.

31.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding that the said district court did not err in giving to the jury the following instruction, to-wit:

"It was the duty of the defendant railroad company to use ordinary care to furnish John J. Spellman, plaintiff's decedent, with a reasonably safe track over which to run his engine and train. If you find from all the evidence in this case, when weighed in accordance with these instructions, that the plaintiff has established, by a preponderance of the evidence, that the main track of defendant's railroad track at the switch in question, was not in a reasonably safe condition, and that such unsafe condition, if you so find, was due to the want of ordinary care on the part of the defendant company, or its employes, in failing to properly care for or to maintain said track at the place in question, and that such unsafe condition and want of care, if any, was the direct and proximate cause of the derailment and overturning of the engine, which caused the death of John J. Spellman, you would then be justified in finding that the defendant company was negligent and that its negligence was the proximate cause of the death of the said John J. Spellman. But, if when you have considered all the evidence in this case, and weighed the same in accordance with these instructions, you do not find that the plaintiff has established by a preponderance of the evidence that the derailment and overturning of the engine was due to the want of proper care on the part of the defendant, or its employes, then you should find for the defendant, upon this claim of negligence."

170 32.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding that the said district court did not err in giving to the jury the following instruction, to-wit:

"The evidence shows without dispute that an open switch caused the derailment and overturning of the engine which resulted in the injury to and death of plaintiff's decedent, John J. Spellman, and one of the acts of negligence charged in the petition is, that the opened switch was due to the negligence of employes of the defendant company, while handling and moving cars in the railway yards of the defendant company at Oelwein, and that said switch remained open at a time when the defendant company and its employes knew that the train on which plaintiff's decedent, John J. Spellman, was engineer, was due to arrive at the place where such switch was located. If you find from all the evidence in the case, when weighed in accordance with these instructions, that plaintiff has established by a preponderance of the evidence that the switch in question was opened by employes of the defendant company while handling and moving cars in the railway yards of the defendant company at Oelwein, and that said switch remained open at a time when the defendant company knew, or by the exercise of ordinary care should have known, that the train on which John J. Spellman was engineer was due to arrive on the main line at such switch, you would then be justified in finding that the defendant company was negligent, and that its negligence was the proximate cause of the death of the

said John J. Spellman. But if, when you have considered all the evidence in the case and weighed the same in accordance with these instructions, you do not find that the plaintiff has established by a preponderance of the evidence that the switch was opened by employes of the defendant company while handling and moving cars in the railway yards of the defendant company at Oelwein, and that said switch remained open at a time when the defendant company knew, or by the exercise of ordinary care, should have known, that the train on which John J. Spellman was engineer was due to arrive on the main line at such switch, then you should find in favor of the defendant upon this claim of negligence."

33.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Em-
171 ployers' Liability Act, by holding that the said district court did not err in giving to the jury the following instruction, to-wit:

"If you find for the plaintiff you will then be required to fix the amount of his recovery herein.

The plaintiff is the administrator of the estate of the deceased, and as such he brings this action. But he is entitled to recover only the pecuniary loss, if any, which it is shown by a preponderance of the evidence the surviving widow of John J. Spellman, deceased, whose name is Fannie L. Spellman, has suffered by reason of her husband's death.

If you have found affirmatively as to all of the propositions stated in Instruction No. 2 hereof, and you further find that the said John J. Spellman was not guilty of any negligence on his part which contributed in any degree to cause his injury and death, then the plaintiff will be entitled to a verdict for the present worth of the pecuniary loss said surviving widow has sustained by reason of the death of her husband, or, in other words, such an amount, if any, as paid now will fairly and justly compensate her for said pecuniary loss. The pecuniary loss, to her, if any, consists only of such sum as now paid will represent and equal such sums or amounts of money as under the evidence you can fairly and justly find he, the husband, would have contributed to her had he not lost his life at the time and in the manner as shown by the evidence.

From the nature of the things involved, such amount it is impossible to accurately and definitely establish, and the amount of your verdict must be left to the common sense, good judgment and sound discretion of the jury. Evidence has been introduced as to the earnings of the deceased and as to his disposition of his earnings during his life, and immediately before his death. You will take into consideration his earnings and what proportions thereof were used during his lifetime for himself personally, and what if any proportion of his future wages if he had lived would have been used for his own personal expenses, and ascertain from the evidence the amount of

pecuniary loss the surviving widow has sustained because of the death of her husband.

In no event should your verdict be for a greater amount than $20,000.00, the amount claimed in the petition."

35.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Em-
172 ployers' Liability Act, by affirming the judgment of the district court of Polk County, Iowa.

36.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, in not reversing the judgment of the district court of Polk County, Iowa, in this case.

37.

Because the Supreme Court of Iowa denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by denying to the plaintiff in error a rehearing of this cause and by overruling the said petition for rehearing and entering a final judgment herein.

Wherefore, plaintiff in error prays the final judgment of the Supreme Court of Iowa, being the judgment of affirmance of the said Supreme Court of Iowa in this case, be reversed, annulled, and held for naught; and that the said court be directed by the mandate of this court to enter a judgment reversing the judgment of the said district court of Polk County, Iowa.

GEO. H. CARR,
FRED. P. CARR,
DONALD EVANS,
O. M. BROCKETT,
Attorneys for Plaintiff in Error Chicago Great Western Railroad Company.

[Endorsed:] 9—30018. C. G. W. R. R. Co., App'l't, Pl't'f in Error, vs. L. W. Basham, Adm'r, Def't in Error. Polk, D. C. Assignment of errors and prayer for reversal, U. S. S. Court. Stay. Filed Dec. 21, 1916. B. W. Garrett, clerk Supreme Court.

173 UNITED STATES OF AMERICA, *sct:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Iowa, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before

you, at the September Term, 1916, thereof, between L. W. Basham, Administrator of the estate of John J. Spellman, deceased and Chicago, Great Western Railroad Company, a manifest error hath happened, to the great damage of the said Chicago, Great Western Railroad Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the City of Washington, D. C. and filed in the office of the Clerk of the Supreme Court of the United States, on or before the fifth day of February, 1917, to the end that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, The Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and the seal of the District Court of the United States, Southern District of Iowa.

Issued at office in Des Moines, this 23d day of December, in the year of our Lord one thousand nine hundred sixteen.

[Seal U. S. District Court, District of Iowa.]

W. C. McARTHUR, *Clerk*,
By —— ——, *D. C.*

174 Copy.

In the Supreme Court of the State of Iowa.

No. 30018. At Law.

CHICAGO GREAT WESTERN RAILROAD COMPANY, Appellant (now Plaintiff in Error),

vs.

L. W. BASHAM, Administrator of the Estate of John J. Spellman, Deceased, Appellee (now Defendant in Error).

Bond on Writ of Error.

Know all men by these presents:

That we, Chicago Great Western Railroad Company, as Principal, and National Surety Company, as Surety, are held and firmly bound unto L. W. Basham, Administrator of the estate of John J. Spellman, deceased, in the sum of Fifteen Thousand ($15,000.00) Dollars, to be paid to the said obligee, his successors, representatives and assigns; to the payment of which, well and truly to be made, we bind ourselves, our successors, representatives and assigns, jointly and severally, by these presents.

Sealed with our seals and dated the — day of ——, A. D. 1916.

Whereas the above named plaintiff in error has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Iowa.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

CHICAGO GREAT WESTERN RAILROAD COMPANY, *Principal,*
By CARR, CARR & EVANS.
NATIONAL SURETY COMPANY, *Surety,*
By CHESTER E. FORD, *Attorney-in-Fact.*

Approved to operate as supersedeas this 20 day of December, 1916.
W. D. EVANS,
Chief Justice.

175 UNITED STATES OF AMERICA, *ss:*

Citation.

To L. W. Basham, Admr. of estate of John J. Spellman, Deceased:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of Iowa, wherein the Chicago Great Western Railroad Company is the plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected and speedy justice be done to the parties in that behalf.

Given *unto* my hand at the city of Des Moines, Iowa, this 5 day of January, 1917.

F. R. GAYNOR,
Chief Justice of the Supreme Court of Iowa.

Service of the foregoing citation is hereby accepted and receipt of copy acknowledged at Des Moines, Iowa, this 8th day of January, 1917.

THOS. A. CHESHIRE AND
CLARK, BYERS & HUTCHINSON,
Attorneys for Defendant in Error.

176 STATE OF IOWA, *ss:*

I, B. W. Garrett, Clerk of the Supreme Court of Iowa, hereby certify that the foregoing is a true and correct copy of appellant's abstract of record; appellee's additional abstract of record; opinion of

this court filed on November 26th, 1915; supplemental opinion of this court filed on April 7th, 1916; judgment entry and order affirming the judgment of the district court entered on the 26th day of November, 1915; judgment entry and order of the court overruling appellant's first petition for rehearing, entered on the 7th day of April, 1916; final judgment and order of the court overruling appellant's second petition for rehearing, entered on the 18th day of December, 1916; petition for writ of error; assignment of errors; order allowing writ of error; writ of error; supersedeas bond; order approving supersedeas bond; citation and acceptance of service thereof; stipulation of the parties respecting what *what* the transcript of the record to be filed in the office of the clerk of the Supreme Court of the United States shall include.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Des Moines this 22d day of January, A. D. 1917.

[Seal of the Supreme Court of Iowa.]

B. W. GARRETT, *Clerk*,
J. V. ARNEY, *Deputy*.

177 In the Supreme Court of Iowa.

L. W. BASHAM, Administrator of the Estate of John J. Spellman, Deceased, Appellee,

vs.

CHICAGO GREAT WESTERN RAILROAD COMPANY, Appellant.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto that the clerk of the Supreme Court, in making up a transcript of the record in the above entitled cause, in obedience to the writ of error allowed herein, shall include only the following papers and records, to-wit:

1. Appellant's Abstract of Record.
2. Appellee's Additional Abstract of Record.
3. Opinion of the court filed November 26th, 1915, printed in Northwestern Reporter, Vol. 154, pages 1019-1028.
4. Supplemental opinion of the court, filed April 7th, 1916, printed in Northwestern Reporter, Vol. 157, page 192.
5. Judgment entry and order affirming the judgment of the district court entered on November 26th, 1915.
6. Judgment entry and order of the court overruling appellant's first petition for rehearing, entered on the 7th day of April, 1916.
7. Final judgment and order of the court overruling appellant's second petition for rehearing entered on the 18th day of December, 1916.
8. Petition for Writ of Error.
9. Assignment of Errors.

10. Order allowing Writ of Error.
11. Writ of Error.
12. Supersedeas Bond.
13. Order approving supersedeas bond.
14. Citation and acceptance of service thereof.

178 15. Stipulation of the parties respecting what the transcript of the record to be filed in the office of the clerk of the Supreme Court of the United States shall include.

O. M. BROCKETT,
CARR, CARR & EVANS,
Attorneys for Appellant-Plaintiff in Error.
CLARK, BYERS & HUTCHINSON AND
THOS. A. CHESHIRE,
Attorneys for Appellee-Defendant in Error.

Endorsed on cover: File No. 25,731. Iowa Supreme Court. Term No. 901. Chicago Great Western Railroad Company, plaintiff in error, vs. L. W. Basham, Administrator of the estate of John J. Spellman, deceased. Filed January 27th, 1917. File No. 25,731.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 910

CHICAGO GREAT WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

L. W. BASHAM, ADMINISTRATOR OF THE ESTATE OF JOHN J. SPELLMAN, DECEASED, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

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STATEMENT.

This action was brought in the Polk County District Court on the 21st day of April, 1911, by defendant in error as administrator of the estate of John J. Spellman, deceased, under the state laws, to recover damages resulting to his estate. More than two years later in October, 1913, by amendments to his petition, defendant in error changed the action to one to recover damages for the benefit of his surviving widow under the federal Employers' Liability Act.

The Iowa Supreme Court held that such change from law to law was not the commencement of a new action and that the petition as amended was not subject to a plea of the bar of the limitation period in the act.

Plaintiff in error owns and operates lines of railroad running from Minneapolis, Minnesota, to Oelwein, Iowa; from Chicago to Oelwein; and from the latter point to Kansas City, Missouri. The line from Oelwein to Kansas City, known as the Southwest Division, passes through the city of Des Moines. John J. Spellman was a locomotive engineer in the employ of plaintiff in error.

On the 28th day of March, 1910, Mr. Spellman received fatal injuries from which he died the following day. His fatal injuries were caused at Oelwein, Iowa, by the derailing and overturning of his engine. The engine was hauling passenger train No. 4 from Kansas City. Mr. Spellman's run was from Des Moines to Oelwein. His train left Des Moines at 9:15 A. M. passing through Fairbanks, the last station before reaching Oelwein, at 2:18 P. M. and was due to arrive at Oelwein at 2:30 P. M. About half a mile southwest of the station at Oelwein is a switch where a "Y" track leads off the main line. When the train struck this switch it was partially open, being lined up neither for the main track or the "Y" track. The switch points were not against the rails on either track, leaving space sufficient for the flanges of the locomotive to pass between, causing the wheels to drop down on the ties and resulting in overturning the engine, fatally injuring Mr. Spellman.

It is alleged in the petition that the switch was left open by one of the trainmen in the defendant's employ, in moving and handling its trains in the yards at Oelwein. One hour before the accident, the switch was inspected by the track walker and found to be closed, locked and lined up for the main line. Fifteen minutes before the accident, an extra freight consisting of an engine and tender coming into Oelwein from the Southwest, ahead of No. 4, passed over this switch on the main line. At that time the switch was closed and set for the main line and the train passed over the switch safely. During the entire day of the accident the switch in

question had not been used by the employees of the company and there had been no switching of trains, cars or engines in that part of the yards. After the accident the switch was found unlocked. The padlock was battered as though it had been pounded open and a heavy spike was found lying near.

The questions which will be here presented are:

(1) Is defendant in error's cause of action as stated in his petition as amended, barred by the two years limitation period contained in the federal Employers' Liability Act?

(2) Is the evidence sufficient to sustain a recovery by defendant in error?

These questions were raised by an answer to the petition as amended, containing in the first division a general denial and in a separate division the allegations that plaintiff's decedent died on the 29th day of March, 1910; that the cause of action on which the plaintiff now seeks to recover was not alleged or set up until the filing of the amendment to plaintiff's petition on Oct. 13, 1913, and more than two years after the cause of action arose; that the cause of action set up by plaintiff's petition, as amended, is barred by the statute of limitations, and that plaintiff is barred and estopped from recovering thereon.

Both questions were further raised by a motion to take the case from the jury and direct them to return a verdict in favor of the defendant at the close of the plaintiff's evidence. Also by a motion to direct a verdict at the close of all the evidence by requests to instruct, by exceptions to instructions given and by motion for a new trial.

SPECIFICATIONS OF ERRORS RELIED UPON.

I.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of the act of Congress, approved April 22, 1908, commonly known as the Employers' Liability Act (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, sec. 8657), as amended April 5, 1910, (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, sec. 8662), regulating the liability of common carriers engaged in interstate commerce and the amendments thereto, in that said Supreme Court of Iowa by its rulings, judgment, and decision in this case refused to grant to plaintiff in error a peremptory instruction, whereas, under said act of congress and amendments thereto, plaintiff in error was entitled both in the district court of Iowa in and for Polk County and in the Supreme Court of Iowa to a peremptory instruction in its favor. (Assigned errors 1 and 2, Transcript 99. Motion to direct verdict at close of evidence, Transcript 41, Exception to overruling

same, Transcript 42. Request for binding instruction No. 1, Transcript 42. Exception to court's refusal to give same, Transcript 43, also Transcript 44.)

II.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of the Act of Congress commonly known as the Employers' Liability Act, by affirming the judgment of the district court of Polk County, Iowa. (Opinion, Transcript 77. Supplemental opinion, Transcript 92. Assigned error 35, Transcript 109.)

III.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of the said Act of Congress commonly known as the Employers' Liability Act, in not reversing the judgment of the district court of Polk County, Iowa, in this case. (Opinion, Transcript 77, Supplemental opinion, Transcript 92, Assigned error 36, Transcript 109.)

IV.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of the said Act of Congress commonly called the Employers' Liability Act, by denying to the plaintiff in error a rehearing of this cause and by overruling the said petition for rehearing and entering a final judgment herein.

(Opinion, Transcript 77, Supplemental opinion, Transcript 92, Assigned error 37, Transcript 109.)

SPECIFICATION OF ERRORS RELATING TO THE STATUTE OF LIMITATIONS.

V.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding and deciding that notwithstanding this action was originally brought under the laws of the state of Iowa, amendments filed more than two years after the cause of action arose, claiming the right to recover under the Act of Congress called

the Employers' Liability Act, did not state a new cause of action. (Assigned error 7, Trans. 101; Supplemental opinion, Trans. 92.)

VI.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding and deciding that the plea of the statute of limitations to the petition as amended did not present a good defense. (Assigned error 8, Trans. 101, Supplemental opinion, Trans. 92.)

VII.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding and deciding that an amendment to the petition made after two years from the commencement of the action, changing the action from one under the state law to one under the Act of Congress, by which there was a departure from law to law, was permissible, and that the petition as thus amended was not subject to the defense of the statute of limitation. (Assigned error 9, Transcript 101; Supplemental opinion, Transcript 92.)

VIII.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by refusing to hold that the district court of Polk County, Iowa, in the trial of this cause committed error in refusing to give Instruction No. 2 asked by defendant in said court (plaintiff in error here) as follows, to wit:

> "The Court instructs you that the cause of action set up by the plaintiff in his petition as amended is barred by the statute of limitations, and your verdict must therefore be for the defendant."

(Assigned error 10, Transcript 102; Request for Instruction No. 2, Transcript 42; Refusal of court to give said instruction with exception, Transcript 43; Also written exception, Transcript 44-VI.)

IX.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly known as the Employers' Liability Act, by holding that the petition of the plaintiff, (defendant in error here) filed on the 21st day of April, 1911, and the proceedings had prior thereto, arrested the running of the limitation period for the commencement of actions, contained in said act.

(Assigned error 11, Transcript 102; Supplemental opinion, Transcript 92.)

X.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly known as the Employers' Liability Act, by holding that the amendments to the petition filed by plaintiff (defendant in error here) more than two years after the death of said Spellman, which amendments were filed on and subsequent to the 13th day of October, 1913, did not state a new cause of action. (Assigned error 12, Transcript 102; Supplemental opinion, Transcript 92.)

XI.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding that the amendments filed more than two years after the death of said Spellman, which occurred on the 29th day of March, 1910, were mere amplifications of the original petition. (Assigned error 13, Trans. 102; Supplemental opinion, Trans. 92.)

XII.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding and deciding that the petition as amended, more than two years after the death of said Spellman, was not barred by the period of limitations for the commencement of actions, contained in said Act of Congress. (Assigned error 14, Trans. 103; Supplemental opinion, Trans. 92.)

XIII.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right to an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding and deciding that the defense of the statute of limitations was not well founded. (Assigned error 15, Trans. 103; Opinion, Trans. 77.)

XIV.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by refusing to hold that the said district court of Polk County, Iowa, erred by not sustaining defendant's (plaintiff in error here) motion to direct a verdict at the close of plaintiff's evidence on the 4th and 5th grounds thereof, to wit:

> "4. The cause of action presented by the plaintiff's petition as amended is barred by the statute of limitations.
>
> "5. It appears from the undisputed evidence that Mr. Spellman, plaintiff's decedent, died in March, 1910, and more than two years prior to the filing of the petition, setting up the cause of action now set up by the petition as amended."

(Assigned error 16, Transcript 103, Motion to direct verdict, Trans. 13, grounds 4 and 5; Ruling of the court overruling the same and exceptions to such ruling, Transcript 13.)

XV.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress commonly called the Employers' Liability Act, in not holding that the said District Court of Polk County, Iowa, erred in overruling defendant's motion to direct a verdict at the close of all the evidence on the fifth ground thereof, to wit:

> "5. The cause of action set up in plaintiff's petition, as amended, is barred by the statute of limitations."

(Assigned error 17, Transcript 103; Motion to direct ver-

dict at close of evidence on the 5th ground thereof, Transcript 42; Ruling of the court overruling the same and exception to such ruling, Transcript 42.)

SPECIFICATION OF ERRORS RELATING TO THE INSUFFICIENCY OF THE EVIDENCE.

XVI.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, and amendments thereto, by refusing to hold that the district court of Polk County, Iowa, in the trial of said cause, committed error in refusing to give the following instruction requested by the plaintiff in error (defendant in said district court) being Instruction No. 1 asked by defendant in said court, to wit:

> "Under the undisputed evidence, the plaintiff is not entitled to recover, and your verdict will be for the defendant."

(Assigned error No. 2, Transcript 99; Request for instruction, Transcript 42; Exception to court's refusal, Transcript 43 and 44.)

XVII.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding and deciding that the fact of the derailment of the engine by reason of the open switch raised a presumption of negligence on the part of the defendant. (Assigned error 19, Transcript 104; Opinion, Transcript 77.)

XVIII.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress commonly called the Employers' Liability Act, by holding and deciding that the evidence introduced by the plaintiff raised a presumption which was not, as a matter of law, overcome or removed by evidence on the part of the defendant.

(Assigned error 20, Transcript 104; Opinion, Transcript 77.)

XIX.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding and deciding that the doctrine *res ipsa loquitur* applies in an action between master and servant.

(Assigned error 21, Transcript 104; Opinion, Transcript 77.)

XX.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress commonly called the Employers' Liability Act, by holding that the testimony introduced by the plaintiff was sufficient to take the case to the jury.

(Assigned error 22, Transcript 104; Opinion, Transcript 77.)

XXI.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding that the evidence as a whole was sufficient to sustain a verdict in favor of the plaintiff.

(Assigned error 23, Transcript 104, Opinion, Transcript 77.)

XXII.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress; commonly called the Employers' Liability Act, by holding that the said district court did not err in overruling the defendant's (plaintiff in error here) motion to direct a verdict at the close of plaintiff's testimony on the following ground, to wit:

> "1. The evidence fails to establish any negligence upon the part of the defendant."

(Assigned error 24, Transcript 104, Motion, Transcript 13, Ruling and exception, Transcript 13.)

XXIII.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding that the said district court did not err in overruling the defendant's (plaintiff in error here) motion to direct a verdict at the close of plaintiff's testimony on the following ground, to wit:

> "2. The evidence fails to establish any negligence upon the part of the defendant which is the proximate cause of the derailment in which the plaintiff's decedent was injured."

(Assigned error 25, Transcript 105; Motion to direct verdict, Transcript 13; Ruling and exception, Transcript 13.)

XXIV.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding that the said district court did not err in overruling the defendant's (plaintiff in error here) motion to direct a verdict at the close of plaintiff's testimony on the following ground, to wit:

> "3. The evidence fails to show that the misplaced or open switch which it is claimed caused the derailment of the engine which plaintiff's decedent was running, was left open by an employee of the defendant company, or that it was in the condition it was in through any fault or negligence on the part of the defendant or any of its agents or employees."

(Assigned error 26, Transcript 105; Motion, Transcript 13; Ruling and exception, Transcript 13.)

XXV.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding that the said district court did not err in overruling the defendant's (plaintiff in error here) motion to direct a verdict at the close of all the evidence upon the following ground, to wit:

"1. The evidence fails to show that the defendant was guilty of the negligence charged in the petition."

(Assigned error 27, Transcript 105; Motion to direct verdict at close of evidence, Transcript 41; Ruling and exception, Transcript 42.)

XXVI.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding that the said district court did not err in overruling the defendant's (plaintiff in error here) motion to direct a verdict at the close of all the evidence upon the following ground, to wit:

"2. The evidence fails to show that the derailment which resulted in the death of Mr. Spellman was the result of any fault or negligence on the part of the defendant."

(Assigned error 28, Transcript 105; Motion, Transcript 41; Ruling and exception, Transcript 42.)

XXVII.

The Supreme Court of Iowa erred in that it denied to the plaintiff in error a right and an immunity granted to it by a proper construction and application of said Act of Congress, commonly called the Employers' Liability Act, by holding that the said district court did not err in overruling the defendant's (plaintiff in error here) motion to direct a verdict at the close of all the evidence upon the following ground, to wit:

"3. The evidence affirmatively shows, without conflict, that the misplaced switch which caused the derailment of the engine, resulting in the death of Mr. Spellman, was not misplaced or opened, or permitted to be open, by the act of any person in the employ of the defendant company, or of any officer, agent or employee of defendant company; and that said open switch was not due to any negligence on the part of the defendant or of any of its officers, agents or employees."

(Assigned error 29, Transcript 106; Motion, Transcript 41; Ruling and exception, Transcript, 42.)

BRIEF OF ARGUMENT.

THE ACTION BARRED BY THE TWO YEARS' LIMITATION PERIOD IN THE FEDERAL ACT.

I.

Conceding that the original petition stated a cause of action under the state law and that the amendments changed the action to one under the federal act, the Iowa court holds that the petition as thus amended did not state a new cause of action and that the plea of limitations did not present a good defense. (Transcript 92.) Many cases are cited in the opinion in support of the views expressed, not one of which sustain the conclusions announced. (See review of cases in Division One of this Argument.)

M. K. & T. Ry. Co. vs. Wulf, 226 U. S. 570, is relied upon while *Union Pac. Ry. Co. vs. Wyler*, 158 U. S. 293, and *Boston & Maine Ry. Co. vs. Hurd, Admr.*, 47 C. C. A. 615, both of which are recognized as authorities in the *Wulf* case, are not even referred to.

II.

Defendant in error's cause of action as stated in his petition as amended, is barred by the two years' limitation period contained in the federal Employers' Liability Act.

Union Pac. Ry. Co. vs. Wyler, 158 U. S. 293.

The correctness of the holding in this case has been frequently reaffirmed by this court.

Atlantic & Pac. Ry. Co. vs. Laird, 164 U. S. 396;
United States vs. Calcour, 203 U. S. 408;
M. K. & T. Ry. Co. vs. Wulf, 226 U. S. 570;
St. L. I. M. & S. R. Co. vs. Hesterly, 228 U. S. 703.

The following cases recognize the *Wyler* case as unquestioned authority:

Boston & Maine Rd. vs. Wm. H. Hurd, Admr., 47 C. C. A. 615; 108 Fed. 116; 56 L. R. A. 193;
Opinion by Justice Barnes;
Curtice vs. C. & N. W. Ry. Co., 162 Wis. 421; 156 N. W. 486;
Allen vs. Ry. Co. 229 Pa. 97; 78 Atl. 34; 30 L. R. A. (N. S.) 1096;
Bradley vs. Chicago Virden Coal Co., 231 Ill. 622; 83 N. E. 424;
Wingert vs. Carpenter, 101 Mich. 395; 59 N. W. 662;
Box vs. C. R. I. & P. Ry. Co., 107 Iowa, 660;

Van Patten vs. Waugh, 122 Iowa, 302;
Brooks vs. Seevers, 112 Iowa, 480.

The following cases support the plea of limitations:
Atlantic K. & N. Ry. Co. vs. Hooper, 92 Fed. 820;
M. K. & T. Ry. Co. vs. Bagley, 69 Pac. 189; 65 Kans. 188;
Foster vs. St. Luke's Hospital, 60 N. E. 803; 191 Ill. 94.

III.

The Iowa Supreme Court is right in its assumption that in his original petition defendant in error sought to recover under the laws of the state and alleged a good cause of action thereunder. (Trans. 1.) The petition as amended more than two years after the cause of action arose changed the action to one under the federal Employers' Liability Act. (Transcript page 4—Second amendment, Transcript page 5, bottom of page.)

IV.

The original petition did not state a cause of action under the Act of Congress. The petition as amended did state a cause of action under the act. In view of the provision in Section 6 of the act that "no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued" the amendment could not be made the medium of introducing this new cause of action. "Whether in what was done this restriction was in effect disregarded is a federal question and subject to re-examination here, however much the allowance of the amendment otherwise might have rested in discretion or been a matter of local procedure. *Atlantic Coast Line R. Co. vs. Burnett*, 239 U. S. 199."
Seaboard Air Line Ry. Co. vs. Renn, 36 S. C. Rep. 567; 241 U. S. 290.

V.

The original opinion, after some reference to questions of practice, assumed that the defense of the Statute Limitations was properly pleaded but held that it was not well founded.
"A federal question must be deemed to have been presented with sufficient clearness to sustain a writ of error from the Federal Supreme Court to a state court, where the latter court has held that the question was sufficiently raised, and decided it." *St. L. I. M. & S. Ry. Co. vs. Hesterly, Admr.*, 228 U. S. 702.

THE INSUFFICIENCY OF THE EVIDENCE.

VI.

Defendant in error's evidence is insufficient to permit a recovery under the Employers' Liability Act. It goes no further than to show that the switch was partly open and that as a result the engine was derailed, causing fatal injuries to Mr. Spellman. There is no evidence showing that the switch was left open by any person for whose act plaintiff in error is responsible. There is no evidence that it had knowledge that the switch was not in a safe condition at any time prior to the accident. (Transcript of Record, pages 6-7-8-9-10 and 11.) In addition to the oral testimony he introduced the following exhibits:

Photographs Exhibits "A" and "B", Transcripts 35 and 37. They are correct representations of the switch, tracks and vicinity where the accident occurred, as they were before the accident.

Exhibit "C" is a photograph of the switch showing the lever down and locked. (Transcript 39.)

VII.

The evidence introduced by the defendant in error showing that an open switch caused the derailment resulting in the fatal injuries of the decedent did not raise a presumption or inference of negligence. The doctrine, *res ipsa loquitur* is not applicable.

C. & N. W. Ry. Co. vs. O'Brien, 132 Fed. 593; 67 C. C. A. 421;
Northern P. R. Co. vs. Dixon, 139 Fed. 737; 71 C. C. A. 555;
Patton vs. Texas & P. R. Co., 179 U. S. 658; 21 S. C. Rep. 275;
Texas & P. R. Co. vs. Barrett, 166 U. S. 617; 17 S. C. Rep. 707;
Midland Valley Ry. Co. vs. Fulgham, 181 Fed. 91; 104 C. C. A. 151;
Cryder vs. C. R. I. & P. Ry. Co., 152 Fed. 418; 81 C. C. A. 559;
Brownfield vs. Ry. Co., 107 Iowa, 254; 77 N. W. 1038;
Brymer vs. Ry. Co., 90 Cal. 497; 27 Pac. 371;
Huff vs. Austin, 46 Ohio State 386; 21 N. E. 864;
Wormell vs. Ry. Co., 79 Me. 397; 10 Atl. 49;
Grant vs. Rd. Co., 133 N. Y. 659; 31 N. E. 220;
Kansas City Ry. Co. vs. Cook, 100 Ark. 467; 140 S. W. 579.

VIII.

If a master can be held liable without proof of negligence, "the rule that an employee assumes the ordinary risks of his employment would be wholly done away with."

Quincy Mining Co. vs. Kitts, 42 Mich. 41; 3 N. W. 240;

C. N. W. Ry. Co. vs. O'Brien, 132 Fed. 593; 67 C. C. A. 421.

IX.

Mere surmise or conjecture will not take the place of proof, and where the evidence is equally consistent with the absence as with the existence of negligence, no recovery can be had.

Edgar vs. Rio Grande Western Ry. Co., 32 Utah 330; 90 Pac. 745; 11 L. R. A. (N. S.) 738;

Patton vs. Texas Pac. Ry. Co., 179 U. S. 658; 21 S. C. Rep. 275;

Texas & Pac. Ry. Co. vs. Barrett, 166 U. S. 617; 17 S. C. Rep. 707;

Mining Co. vs. Kitts, 42 Mich. 41; 3 N. W. 240;

Grant vs. Railroad Co., 133 N. Y. 659; 31 N. E. 220;

Midland Valley Ry. Co. vs. Fulgham, 181 Fed. 91; 104 C. C. A. 151;

M. K. & T. Ry. Co. vs. Foreman, 98 C. C. A. 281; 174 Fed. 377;

Kern vs. Snider, 76 C. C. A. 203; 145 Fed. 327;

Spencer vs. Ry. Co., 105 Wis. 311; 81 N. W. 407;

Thomas vs. Railroad Co., 148 Pa. 180; 23 Atl. 989; 15 L. R. A. 416;

Hyer vs. Janesville, 101 Wis. 371; 77 N. W. 729.

X.

The fact that switch keys were shown to be in the possession of trainmen, switchmen, section foremen, and hostlers from 1902 to 1907 was not proof of the negligence charged. Such evidence does not raise an inference that the switch was opened by some one to whom the company had entrusted a key. And even if it did, it would not show that plaintiff in error was responsible for the switch being open. *Edgar vs. Rio Grande W. Ry. Co.*, 32 Utah, 330; 90 Pac. 745; 11 L. R. A. (N. S.) 738.

XI.

Plaintiff in error's evidence shows conclusively and without dispute that it was not responsible for the open switch.

The company had four switching engines in its yards at Oelwein. (Transcript 14, line 28.) The switch engines were operated by an engineer, fireman, and three switchmen, one called the foreman and the others helpers. (Transcript 15, lines 2 to 5) Linney, Becker, Plashal and Reese were each foreman of one of the crews. (Transcript 26, bottom of page) Linney's crew had not used the switch in question for several days before the accident. (Transcript 22.) Becker's crew had not used the switch in question on the day of the accident or for several days prior thereto. (Transcript 23, lines 10 to 15.) Plashal's crew did not use the switch in question on the day the accident occurred. Did no work there and had no occasion to use it. (Transcript 24, bottom of page.) The switch was last used the day before the accident for turning this same train No. 4 by the crew of which Reese was foreman. (Transcript 27, lines 1 and 2 and 15 to 20.) None of the crew that did the switching left the switch open. (Transcript 27, lines 39 and 40.) After the switch was last used a number of trains from the southwest passed over the switch going into Oelwein. (Transcript 18.) An engine could not stay on the track with the switch or tracks in the condition that they were in after the accident, going toward the depot. (Transcript 30, lines 24 to 30.) The points of the rails were standing away about an inch or so from the stock rail, leaving an opening there where the flange would go between; the wheel would run on the rail until the track separated far enough to let the wheels drop between the rails. (Transcript 29, lines 28 to 33) Exhibit No. 1 shown in Photograph Exhibit C is a standard lock. The same key would unlock all the switch locks; a standard lock and standard keys. (Transcript 19, lines 9-11.)

After the accident the padlock was hanging down on the switch stand, unlocked and out of the hasp. The ring in the lock was battered, as though it had been hammered. (Transcript 32, bottom of page.) The lock on the switch stand the day the wreck occurred was in such condition that when placed in the hasp and locked, by pulling on the chain it could be unlocked. (Transcript 33, lines 19-22.) An hour before the accident occurred, a trackwalker inspected the switch and track. The track was lined up for the main line all right. The switch was all right in the place it belonged, set for the main line. (Transcript 21.) Fifteen minutes before the accident an engine and tender coming from the southwest ran over this same switch into Oelwein. (Transcript 14, lines 17-25.) The switch was set for the main line and the engine passed over it safely going about ten miles an hour. (Transcript 28 and first 8 lines of Transcript 29.)

XII.

Presumptions which arise or inferences which may be drawn from the evidence in relation to the happening of an accident may be overcome as a matter of law by uncontradicted evidence of lack of negligence.

O'Conner vs. I. C. R. Co., 83 Iowa, 105;
Baker vs. C. R. I. & P. Ry. Co., 95 Iowa, 163;
Klitzke vs. Webb, 120 Wis. 254; 97 N. W. 901;
Spaulding vs. C. N. W. Ry. Co., 33 Wis. 582;
Cronk vs. C. M. & St. P. Ry. Co., 3 So. Dak. 93; 52 N. W. 420;
Vorbrick vs. Geuder & Paeschke Mfg. Co., 96 Wis. 277; 71 N. W. 434;
Spaulding vs. Ry. Co., 30 Wis. 110;
Read vs. Morse, 34 Wis. 315;
Gibbons vs. Rd. Co., 62 Wis. 546; 22 N. W. 533;
Menominee River Sash & Door Co. vs. M. & N. R. Co., 91 Wis. 447; 65 N. W. 176;
Dingley vs. Knitting Co., 134 N. Y. 552; 32 N. E. 35;
Brymer vs. Rd. Co., 90 Cal. 496; 27 Pac. 371;
Duffy vs. Upton, 113 Mass. 544;
Ross vs. Cordage Co., 164 Mass. 257; 41 N. W. 284;
So. Kansas Ry. Co. vs. Walsh, 45 Kans. 653; 26 Pac. 45.

XIII.

Whether the evidence is sufficient to overcome the presumption arising from the application of the doctrine *res ipsa loquitur* when undisputed, is for the court and not for the jury. It is for the court and not for the jury to determine the amount and character of proof necessary to overcome it. The presumption which arises from the application of the doctrine is one of law and not of fact.

Spaulding vs. C. & N. W. Ry. Co., 33 Wis. 582;
Klitzke vs. Webb, 120 Wis. 254; 97 N. W. 901;
Vorbrick vs. Geuder & Paeschke Mfg. Co., 96 Wis. 277; 72 N. W. 434;
Cronk vs. C. M. & St. P. Ry. Co., 3 S. Dak. 93; 52 N. W. 420.

XIV.

It is the settled rule of the federal courts that when the evidence given at the trial and all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant.

Schofield vs. C. M. & St. P. Ry. Co., 5 S. C. Rep. 1125; 114 U. S. 615.

Citing *Improvement Co. vs. Munson*, 14 Wall. 442; *Pleasants vs. Fant*, 22 Wall. 116; *Herbert vs. Butler*, 97 U. S. 319; *Bowditch vs. Boston*, 101 U. S. 16; *Griggs vs. Houston*, 104 U. S. 553; *Randall vs. Baltimore & Ohio R. Co.*, 109 U. S. 478; *Anderson Co. Com'rs vs. Beal*, 113 U. S. 316; *Commissioners vs. Clark*, 94 U. S. 278.

This rule of federal courts was adopted by the Supreme Court of Iowa in 1892 in *Meyer vs. Houck*, 85 Iowa, 319, and has since remained the law of the state.

XV.

After holding that a presumption of negligence arose from the happening of the accident and that such presumption could not be overcome as a matter of law by undisputed evidence of lack of negligence no matter how conclusive, the writer of the opinion expresses the view that in any event the defendant's evidence was not of a conclusive character. He assigns two reasons in support of this view. The first is that the trackwalker "does not say that he stopped in his walk, but appears to have satisfied himself by a glance as he walked south between the rails and back again on the north side of the track."

The trackwalker testified:

"I observed the switch stand as I went by; the switch was all right, in the place it belonged." (Transcript 21, lines 12 and 13.) "When I got to the switch stand, I stayed there a minute or two." (Transcript 21, lines 24 and 25.)

The second is that the lock was hanging in the eye of the switch stand when examined by the trackwalker and that it was in the same position after the accident. The learned justice overlooks the fact that the switch stand could not have been in the proper position, as the witness testified, without the handle being perpendicular and over the eye and that being in that position it could not be moved, whether the lock was locked or unlocked. (Transcript 7, lines 22-24.) After the accident the handle was raised above the eye of the lock and in nearly a horizontal position. The possibility that the switch was left open by the crew last using it, twenty-four hours before the accident, indulged in by the writer of the opinion, is contrary to the record and presents a theory based upon a physical impossibility.

XVI.

The insufficiency of the evidence to permit a recovery under the federal act presents a federal question.

St. L. & Iron Mt. Ry. vs. McWhirter, 229 U. S. 265; 33 S. C. Rep. 858;
K. C. So. R. Co. vs. Commission Co., 223 U. S. 573; 32 S. C. Rep. 316;
Creswill vs. Grand Lodge, K. P. 225 U. S. 246; 32 S. C. Rep. 822;
Nor. Pac. Ry. vs. N. Dakota, 236 U. S. 585; 35 S. C. Rep. 429;
Wood vs. Chesborough, 228 U. S. 672; 33 S. C. Rep. 706;
Norfolk & West. Ry. vs. Conley, 236 U. S. 603; 35 S. C. Rep. 437.

ARGUMENT.

I.

DEFENDANT IN ERROR'S CAUSE OF ACTION IS BARRED BY THE TWO-YEAR LIMITATION PERIOD CONTAINED IN THE FEDERAL ACT.

In support of the above contention we submit three propositions:

1. The action as originally brought stated a cause of action under the state law. The amended petition seeks to recover under the act of congress and was therefore a departure from law to law.

2. The original petition did not state a cause of action under the federal act and hence the bringing of the action and filing of the petition did not arrest the running of the statute.

3. The petition as amended presents a new cause of action and the amendment is not a mere amplification of the original petition.

The case of *Union Pacific Ry. Co. vs. Wyler*, 158 U. S. 285, 15 Sup. Ct. Rep. 877, appears to be decisive of the first proposition. From the very full and exhaustive opinion, by Mr. Justice White, we quote the following:

> "It is argued, however, that, as all the facts necessary to recovery were averred in the original petition, the subsequent amendment set out no new cause of action in alleging the Kansas statute. If the argument were sound, it would only tend to support the proposition that there was no departure or new cause of action from fact to fact, and would not in the least meet the difficulty caused by the departure from law to law. Even though it be conceded that all the facts necessary to give a right to recover were contained in the original petition, as this predicated the assertion of that

right on the general law of master and servant, and not upon the exceptional rule established by the Kansas statute, it was a departure from law to law. The most common if not the invariable, test of departure in law, as settled by the authorities referred to, is a change from the assertion of a cause of action under the common or general law to a reliance upon a statute giving a particular or exceptional right. * * * The general rule is that an amendment relates back to the time of the filing of the original petition, so that the running of the statute of limitations against the amendment is arrested thereby. But this rule, from its very reason, applies only to an amendment which does not create a new cause of action. The principle is that, as the running of the statute is interrupted by the suit and summons, so far as the cause of action then propounded is concerned, it interrupts as to all matters subsequently alleged by way of amendment, which are part thereof. But where the cause of action relied upon in an amendment is different from that originally asserted, the reason of the rule ceases to exist, and hence the rule itself no longer applies."

The test applied in the *Wyler* case is whether the cause of action set up in the amendment is *different* from that originally asserted. Can it be doubted that the cause of action set out in the petition as amended in the instant case is *different* from the cause of action originally asserted? If the original petition and the amended petition were placed side by side and the allegations of each carefully noted, could it be said with any semblance of reason that they were not different? The difference is that the original petition states a complete and well-alleged cause of action under the state law without a single immaterial allegation. Even though the federal act had not been passed, there could have been no recovery under the petition as amended under the state law. Under the petition as amended no recovery of damages to the estate could have been recovered, because no such damages were alleged or prayed.

On the other hand, under the original petition, there could be no recovery of damages under the act of Congress. The pleading is lacking in the essential allegations to state a cause of action under the Congressional act. The correctness of the holding in the *Wyler case* has, so far as we have been able to discover, never been called in question in this court. On the contrary, it has been frequently reaffirmed.

Atlantic & Pac. Ry. Co. vs. Laird, 164 U. S. 396;
United States vs. Calcour, 203 U. S. 408;
M. K. T. Ry. Co. vs. Wulf, 226 U. S. 570;
St. L. I. M. Y. S. R. Co. vs. Hesterly, 228 U. S. 703.

The *Wyler* case arose out of the following facts: Otto Wyler was an employee of the Union Pacific Ry. Co. He was employed by the defendant in repairing locomotive engines at Wyandotte, Kansas, where he received a personal injury. At the time the railroad company had in its employ one Charles B. Kline who was acting as helper for Wyler.

Wyler was engaged in repairing a fire box on one of the defendant's locomotives and Kline was assisting him in the work. While so engaged, Kline, while in the act of lifting and placing in position the fire dump belonging to the engine, carelessly and negligently, as alleged, threw it down and let it fall against the plaintiff, by which he was injured. The state law of Kansas provided as follows:

> "Every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employes to any person sustaining damages."

The occurrence for which plaintiff seeks to recover damages happened in the state of Kansas in April, 1883. The first petition was filed in the state court of Missouri on September 25th, 1885, or two years and five months after the injury. By the law of Kansas a cause of action for personal injury is barred after a period of two years. The state law of Missouri bars actions on account of personal injury after five years. The original petition filed in the circuit court of Jackson County, Missouri, as above stated, on the 25th day of September, 1885, alleged that in April, 1883, plaintiff was employed by the defendant at Wyandotte, Kansas, in repairing locomotives and engines, and that he was furnished as an assistant, Charles B. Cline, who was wholly incompetent and unfit for the position which he occupied and the work he performed. That said incompetency was wholly unknown to the plaintiff at said time, though well known to the defendant, and defendant negligently and wrongfully kept and retained said Kline in its employ with full knowledge of his incompetency. The petition then set out the manner in which the accident occurred and the fact that it was due to the negligence and mismanagement of the defendant in employing and retaining Kline after knowing of his incompetency.

The case was removed to the circuit court of the United States for the Western district of Missouri, and an answer was filed alleging that plaintiff's injury resulted from his own negligence, and pleading in bar of the action a limitation of two years under the laws of the state of Kansas. On the 3rd of November, 1887, the plaintiff replied to the amended answer denying the charge of negligence, and demurred to the

third clause of the answer, which pleaded the Kansas statute of limitations. In 1888 the demurrer to the defendant's answer was submitted to the court, which was sustained to so much of the answer as set up the bar of the Kansas statute. Other proceedings were had, and finally on the 2d day of November, 1888, plaintiff filed a second amended petition, in which the averments of the first amended petition were restated except that it eliminated the charge of incompetency on the part of Kline, and the averment of knowledge of such incompetency in the defendant, and rested the cause of action exclusively upon the negligence of Kline, as a fellow servant of the plaintiff, for the reason that a right of action was given by the law of Kansas, where the accident occurred. On the 3d day of November, 1888, the defendant answered the amended petition, setting up among other things that the cause of action alleged in the second amended petition was wholly different from that averred in the original and first amended petition and that the same was barred by the limitation of five years created by the laws of the state of Missouri.

It appears that the original petition was based on the law of master and servant, averring that the injury was due to the negligence of the defendant in employing and retaining in his employ as a fellow servant of plaintiff, an incompetent person with knowledge of his incompetency, while the amendment to the petition to which the plea of the statute of limitations was addressed, eliminated the charge of incompetency and rested the cause of action exclusively upon the negligence of Kline as a fellow servant of the plaintiff, averring liability of the employer for such negligence because of the provision of the Kansas law, where the accident occurred.

Here the action was begun under the state law and after the lapse of the statutory period for bringing such action, the petition was amended so as to set up a cause of action under the federal act. This act creates a new right of action not existing under the law of the state of Iowa. The law of Iowa providing for the recovery of damages resulting to the estate of one killed while engaged in the employ of a railroad company is a different law from the act of congress creating the right of action in favor of the wife of such person. In other words, the act of congress is a special statute giving a right not theretofore existing with an express limitation that the right of action must be asserted within two years of the time it arose. The bringing of an action under the state law was clearly not an assertion of the right given by the federal act. That right not having been set up until the filing of the amendment was lost under the express terms of the statute.

In the brief will be found cited many cases from other jurisdictions in which the *Wyler* case has been recognized

as unquestioned authority. Among these cases is *Boston & Maine Railroad vs. William H. Hurd, Admr.*, 56 L. R. A. 193. The suit was brought in the Circuit Court of the United States for the District of New Hampshire by the administrator of Alice M. Hurd, who was a passenger on the defendant railroad, and was killed in Massachusetts by one of its locomotives while crossing its track. At the time of her death she was a resident of Massachusetts. The suit was, by amendment, left to rest on a statute of Massachusetts, and the question was presented whether the case is barred by the limitation contained in the statute of Massachusetts on which it finally rested. From the opinion, beginning on page 216 of the report, we quote the following:

> "The plaintiff in error also maintains that the action is barred by the one-year limitation found in Mass. Publ. Stat. chap. 112, sec. 212. The declaration contained originally no allegation that there was a widow, or children, or next of kin, and, therefore, no allegation that the suit was brought for their use, which is necessary in one based on the Massachusetts statute. It is a noticeable fact that the *ad damnum* in the writ is $30,000, while the maximum under the Massachusetts statute is $5,000. It is true that the declaration alleged that the deceased lost her life; but it did not show, in the manner required by proper rules of pleading, whether or not she lingered. It set out that she was 'struck, thrown, injured, and suffered excruciating agony,' which furnished the basis of a common law action accruing in her lifetime, and which survived under the statutes of New Hampshire. Therefore the declaration originally set out a cause of action at common law, coupled, possibly, in view of the allegation of death, with some thought of the supplementary damages given by the New Hampshire statute. In these aspects the case is on all fours with *Union P. R. Co. vs. Wyler*, 158 U. S. 285.
>
> "We have observed that the Massachusetts statute, on which the suit is now rested, gives the right of action with a qualified provision that it must be brought within one year from the time of the injury. This is undoubtedly based on a matter of local policy, which follows the statute wherever it goes. We must be careful to notice that a limitation of this kind, incorporated into a statute giving a cause of action which did not exist at common law, is substantially unlike a general statute of limitations. A general statute of limitations must be pleaded in defense, and it can be replied to in various ways. A limitation in a statute like this under consideration must be met by pleadings on the part

of the plaintiff and by the plaintiff's proofs. This subordinate proposition did not arise in *Union P. R. Co. vs. Wyler* because, there the statutes in question of both states were general statutes of limitations. Ordinarily a right of action given by statute, and not existing at common law, is not within a statute of limitations. Angell, Limitations of Actions, sec. 80. Therefore it can have no limitation except that which is contained in the specific statute itself. So that this right of action, if it is not governed in New Hampshire by the one-year limitation, may be brought there at any time in the future. In any view, one essential purpose of the statute of Massachusetts to which this case relates, and of the policy which the statute indicated, would be defeated unless the one-year limitation is held to have effect everywhere. Generally, it may be said that the case in this particular comes within the rule we have already referred to, shown by *Pollard vs. Bailey*, 20 Wall. 20, 22 L. Ed. 376, and *Fourth Nat. Bank vs. Francklyn*, 120 U. S. 747, 30 L. Ed. 825, 7 Sup. Ct. Rep. 757, already cited, that when a suit is brought on a statute of a foreign state, it is governed by all its substantial provisions. *It has been universally held that, where a special statute of this character gives a remedy with an expressed limitation in the statute, the limitation is inherent in the right of action, and follows the remedy wherever there is an attempt to obtain it.* Some of the authorities are given in Buswell, Limitations, sec. 351. Under the circumstances, *Union P. R. Co. vs. Wyler* governs the case; and inasmuch as, at the time the amendment was offered, the one-year period had expired, and the defendant below clearly objected and raised the point, both by plea and exception, the court, as the case then stood, should have directed a verdict for the defendant."

Another case to which we here call special attention recognizing the correctness of the holding in the *Wyler* case is *Box vs. C. R. I. & P. Ry. Co.*, 107 Iowa, 660, which was an action for personal injury. The original petition was filed August 5, 1893, in which particular negligence was charged. In September, 1896, the plaintiff filed an amendment to the petition setting up additional acts of negligence on the part of the defendant. A demurrer was sustained to the amendment to the petition and at the close of the evidence the trial court directed a verdict in favor of the defendant. It is said by the court that the demurrer to the amendment raises the question whether it presents a new or separate cause of action, so as to come within the operation of the statute of lim-

itations. After a somewhat extended discussion of the question, it is said:

> "A case in point and quite instructive, is *Railway Co. vs. Wyler*, 158 U. S. 285, (15 Sup. Ct. Rep. 877). The action was instituted in Missouri by Wyler for injuries caused by a fellow servant in the state of Kansas, and, as the law of Missouri did not make the master liable for the negligence of a fellow servant, the charge of negligence against the company was in its employing and retaining an incompetent person who caused the injury. This plea was filed within the statutory period. After the statute had run, Wyler amended his petition by averring that Kline, the fellow servant, was negligent, and caused the injury so as to bring the case within the law of Kansas, which is like ours, so that, while the action was still for negligence, there was a change of averment as to the particular facts constituting the negligence. The court held that the amendment stated a new cause of action, so that another rule of law obtained, and that it was barred by the statute. The court speaks of it as a 'departure from law to law,' and then as to the facts, it says: 'If the charge of incompetency in the first petition was not *per se* a charge of negligence on the part of the fellow servant, then the averment of negligence, apart from incompetence, was a departure from fact to fact, and therefore a new cause of action.' The case announces a very conclusive rule."

The Iowa court in support of its conclusions that the amendments to the petition did not state a new cause of action so as to permit the defendant to successfully interpose a plea of the statute of limitations, said:

> "Such is the logical and necessary effect of our own holdings. *Cahill vs. Railroad Co.*, 137 Iowa, 577; *Benson vs. Ottumwa*, 143 Iowa, 349; *Kuhns vs. Railroad Co.*, 76 Iowa, 68; *Myers vs. Railroad Co.*, 152 Iowa, 330; *Knight v. Railway Co.*, 160 Iowa, 166; *Myers vs. Kirt*, 68 Iowa, 124; *Bacon vs. Railroad Co.*, 157 Iowa, 501."

The *Cahill* case was an action to recover damages for personal injuries received by the plaintiff while in defendant's employ. In his original petition the plaintiff failed to allege freedom from contributory negligence. More than two years after the commencement of the action, plaintiff asked leave to amend by adding the averment that plaintiff was free from contributory negligence. Leave to amend was denied by the trial court on the ground that the amendment introduced a

new cause of action which was barred by the statute of limitations. The correctness of this ruling came before this court for review. In the course of the opinion it is said:

> "The question we now have is whether an amendment adding such averment after the statutory period of limitation has expired sets up a new cause of action, and one which is therefore barred, or whether it simply makes good the allegations as to the original cause of action insufficiently pleaded within the statutory period.
>
> "It is not easy to point out with accuracy the distinction between the insufficient pleading of a cause of action which may be made good by amendment after the statutory period of limitations, and the total failure to plead a cause of action which cannot be cured without setting up practically a new cause of action, which cannot, of course, be done after the expiration of the limitation period. * * *
>
> "Although plaintiff's petition in such a case as this should contain an allegation of freedom from contributory negligence, yet if no such allegation is made, and the defendant alleges plaintiff's contributory negligence, the issue on that question is the same as though plaintiff had made the proper averment, and the burden of proof is still on the plaintiff to establish the fact of his freedom from fault. It is error in such a case to throw the burden upon defendant, and allow plaintiff to recover merely upon overcoming such proof of negligence on plaintiff's part as defendant may introduce. *Decatur vs. Simpson*, 115 Iowa, 348. If the parties go to trial on a material issue raised in defendant's answer, although it should have been tendered by plaintiff's petition, the court is not justified in directing a verdict for the defendant, if there was evidence bearing on the issue. *Union National Bank vs. Barber*, 56 Iowa, 559. * * *
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> "The situation in the present case was simply this: Plaintiff had failed to allege a fact which should have been alleged to prevent his petition being vulnerable to demurrer. The defendant, instead of demurring, put that very fact in issue by his answer. If plaintiff, instead of asking leave to amend, had proceeded to trial, and introduced evidence showing his freedom from contributory negligence, the court could not properly have directed a verdict against him on account of the defects in his petition.
>
> "The objection might technically have been raised by motion in arrest of judgment under Code, sections 3563, 3758; but on the filing of such motion the plaintiff would have had a right to amend in order to cure

the defect, and as the defect had in fact been cured by going to trial on that issue as raised by defendant's answer, the motion should then have been overruled because the defect had, in fact, been remedied, and the issue which would have been raised by the filing of such amendment had in fact been determined." There is nothing in the case that justifies the claim made for it.

The *Benson* case was an action to recover damages for personal injuries alleged to have resulted to the plaintiff from the negligence of the defendant in maintaining a sidewalk in an unsafe condition. The plaintiff, who at the time of the commencement of the action was a minor, had instituted the action through his father as next friend within three months after the accident occurred, as required by Code sec. 3447, no written notice specifying the time, place, and circumstances of the injury having been served. In the petition filed by the father as next friend it was averred that the minor had suffered severe injuries. More than a year after the filing of the original petition, an amendment was filed in which it was alleged that the minor had attained his majority by marriage, and substitution of himself as plaintiff instead of his father as next friend was asked. The action was thereafter treated as brought by the plaintiff. In a second amendment there was a prayer for increased damages. In a third amendment to the petition it was alleged that for more than a year prior to the action plaintiff was emancipated by his parents, and his father had no control over his earnnings. In a fourth amendment it was alleged that, before the institution of the action, plaintiff's father had assigned to him all claims that he had or could make against the defendant city on account of injuries received by the plaintiff. From the opinion we quote:

> "The sole question presented on this appeal is as to whether the amendments to plaintiff's petition, filed after the expiration of three months from the time when the injuries were received by plaintiff, presented any other or different cause of action from that set up in the original petition, so that they were barred by the statutory provision requiring the action to be brought within three months, where no written notice of the time, place and circumstances of the injury has been served upon the city within sixty days from the happening of the injury. We are clearly of the opinion that the amendments to the petition, so far as they included allegations of additional damages resulting to the plaintiff beyond those alleged in his original petition, were properly allowed. It has been uniformly

held by this court that additional damages arising out of a tort which is alleged in the petition may be stated by way of amendment. * * *

"It is argued that as the defendant had no notice of the assignment until the father's right of recovery had been barred, the defendant might under Code, section 3461, plead the statute of limitations as a defense against the plaintiff as fully as such defense might have been pleaded against the father had the action been brought after the statutory period; but it must be borne in mind that there was originally a cause of action in favor of the plaintiff, and that the assignment by the father simply gave to the plaintiff the right to recover such other damages as the father might have recovered had there been no such assignment, and we think that as the assignment was therefore only of an incidental right, and not of the fundamental cause of action, the plaintiff might plead it as having accrued to him prior to the lapse of the statutory period of limitations, although as an independent right of recovery in favor of the father it may have become barred."

That the case does not support the holding in the opinion under review, must be apparent on a mere casual inspection. The *Kuhns* case was an action to recover damages for the death of Edward C. Kuhns, caused by the derailment of a locomotive engine upon which he was a fireman in the employ of the defendant. There were several acts of negligence charged against the defendant, all of which were denied. At the first trial of the case the negligence charged in the petition was (1) that the track was not properly ballasted; (2) that the rails were not properly spiked to the ties; (3) that the track was rough and uneven; (4) that defendant failed to furnish a suitable engine; (5) that defendant failed to furnish appliances for turning the engine; and (6) that the engine was running backward. After the case had been appealed and remanded for new trial, the plaintiff amended his petition by averring that, at the time of the derailment of the engine, it was running at a dangerously high rate of speed, over an imperfectly constructed and rough and uneven road, and that one of the wheels of the tender of said engine dropped into a low and dangerous place in the roadbed, and said wheel was thereby broken; by reason of which the engine and tender were thrown from the track, etc. This amendment was demurred to on the ground that it was a new cause of action and was barred by the statute of limitations. The demurrer was overruled and the ruling assigned as error. From the opinion we quote:

> "Of course, we concede that where an amendment sets up a new cause of action, not before presented by the petition, it would be vulnerable to the objection that it is barred by the statute of limitations. But in the case at bar the cause of action is for damages alleged to have accrued to the plaintiff by reason of the negligent derailment and turning over of an engine and tender. In the original petition certain acts of negligence are specified. In the amendment certain other specifications of negligence are pleaded. But the cause of action is the same. Indeed, so far as the depression in the track is involved, it is nothing more than a more specific statement of the averment in the original petition that the track was rough and uneven. We are very clearly of opinion that the statement of additional grounds of negligence is not a new cause of action. There is no departure from the original petition in the time, place, or circumstance of the casualty which caused the death of the intestate."

Here, again, we fail to discover the slightest support for the holding in the opinion under review that the plea of the statute of limitations is not well founded. No discussion of the case could make this fact clearer than its mere statement.

The *Myers* case, 152 Iowa, 330, was an action for damages brought by plaintiff William Myers for loss of *consortium* as the result of the wrongful acts of the defendant's employees causing the death of his wife. A demurrer to the petition having been sustained, an amended and substituted petition was filed by F. K. Myers, as administrator of the decedent, claiming damages to her estate. A motion was made to strike the amendment for that it changed the parties plaintiff and alleged a new cause of action. This having been denied, the ruling came up for review, and the court said:

> "Where a party sues in his own right he may, if the facts warrant, amend his complaint so as to make the suit stand in his representative capacity, and conversely, if he sues in his representative capacity, he may be allowed to amend by declaring as an individual; and in either instance it is not considered a substantial change of the cause of action."

Here is no question of the statute of limitations, and nothing which even remotely bears on the question as to whether the defense of the statute of limitations in this case is well founded.

In the *Knight* case, the suit was brought by plaintiff as administrator of the estate of James S. Hayes. It was to recover damages for alleged negligence resulting in the death

of Hayes. It appears that the defendant railway company was an Illinois corporation; that deceased was a resident of Illinois and an employee of the defendant in charge of a street car as a conductor. The accident occurred in Illinois and the cause of action, therefore, accrued in that state and arose under a special statute. The decedent left a widow and child. The administrator was a resident of the state of Illinois. From the opinion we quote the following:

> "At the time of the submission of the case to the jury, the plaintiff's petition had no averment that the decedent left widow or next of kin. It had been held by the Supreme Court of Illinois that such averment was essential to the statement of a cause of action. * * * The absence of such averment was made one ground of the motion in arrest. Thereupon the plaintiff by leave of the court amended the petition after verdict and made such averment to conform with the proofs. The fact itself appeared by undisputed evidence in the record. Thereupon the defendant amended its answer and pleaded that the plaintiff's cause of action was barred under the Illinois statute before the filing of the amendment."

The Illinois statute giving the right of action, contained a provision that every such action should be commenced within one year after the death of such person. In discussing the question as to whether the plea of the statute of limitations was well taken, the court said:

> "This action was *commenced* in the Iowa court within one year. Such call of the statute is therefore answered. The manner of commencing the action in Iowa was necessarily the Iowa manner of commencing an action and not the Illinois manner. Upon commencement of the action, the jurisdiction of the Iowa court attached. The methods of pleading and procedure were necessarily those of the forum and not of the sister state. The manner of commencing a personal action in Iowa is by serving an original notice and not by the filing of the petition. The action could have been commenced by the serving of a notice before the expiration of one year, and this could have been properly followed by the filing of a petition after the expiration of such period. If this petition could be filed after the expiration of one year, why not an amendment also? The identity of the cause of action is not made to depend upon perfection of allegation; nor is the identity changed by the filing of a mere amendment. * * * We think it clear, therefore, that the

particular statute of Illinois, out of which the cause of action arose, was fully complied with by the commencement of this action within one year, and that such statute was in no manner contravened by the subsequent procedure."

It will be seen that the amendment, which, it was held, was not amenable to the limitation provision in the statute under which recovery was sought, was no departure or new cause of action from fact to fact, nor a departure from law to law. The amendment simply sets up an essential fact to complete the cause of action alleged in the petition. It did not change or attempt to change the law under which recovery was sought. In other words, it did not set up any new cause of action. It seems clear that the case is not an authority for the proposition that after the period of limitations expired a suit brought under the state law may by amendment be changed into an action under the federal Employers' Liability Act.

The case of *Myers vs. Kirt*, 68 Iowa, 124, was an action brought to recover damages of the defendant John Kirt for the unlawful sales of intoxicating liquors to plaintiff's husband, by which, it was claimed, she was damaged in her means of support. She demanded the establishment of a lien for her damages as against the saloon property where the liquor was sold, the property being owned by the defendant Reckermire. After the case had been appealed and reversed, the plaintiff amended her petition by alleging that defendant Reckermire had full knowledge of all the facts stated in the original petition, and gave his consent thereto with such knowledge. Reckermire answered, in substance, that more than two years had elapsed between the alleged transactions in the original petition and the filing of the amendment to the petition, and that, therefore, the action was barred by the statute of limitations. A demurrer to the answer of defendant Reckermire was sustained, and from such ruling he appealed. In disposing of the case, this court said:

"We are clearly of the opinion that the demurrer was correctly sustained. The action was commenced on the tenth day of May, 1880. It is exceedingly doubtful whether any amendment to the petition was necessary; but, conceding that it was, the original petition asserted a claim against the property and sought to subject it to the payment of the judgment for damages. It may not have stated all of the facts necessary in law to enable the plaintiff to succeed in the action, but it was not attacked by demurrer or motion. It would be a novel doctrine to hold that the statute of limita-

tions continued to run notwithstanding the commencement of the action."

This case, like the *Knight* case, is authority for the proposition that a petition may be amended to supply an essential allegation where the plaintiff does not thereby present a new cause of action or attempt to base a recovery upon a different law. But it is not an authority for the conclusion announced in the opinion under review, nor does it tend in any degree to support the holding that the defense of the statute of limitations in this case is not well founded.

The distinction between the *Knight* and *Myers* cases and the case at bar is that in those cases there was no departure in the amendment to which the plea of the statute of limitations was addressed, while in the case at bar the amendment to which the plea is addressed was a departure, not only from fact to fact but from law to law; and that is the test which the courts have invariably adopted in determining whether an amendment filed after the statutory period for the commencement of the action presents a new cause of action and is hence open to the plea of the statute of limitations.

But the case upon which the court seems principally to rely in support of the conclusion announced, is the case of *Curtice vs. Ry. Co.*, 156 N. W. 484. It will be observed that in that case, prior to the amendment to which the plea of the statute was addressed, the defendant had answered setting up that the plaintiff and the defendant were engaged in interstate commerce and that the cause of action, if any existed, was under the federal act and not under the laws of the state of Wisconsin. Speaking to the matter, the court said:

> "The defendant was therefore in no way surprised or prejudiced by the amendment. Doubtless the case could have gone to trial on the pleadings as originally framed, and the complaint on the trial amended or treated as amended in accordance with the issues made by the pleadings as originally framed."

It will be observed that the case of *Union Pacific Ry. Co. vs. Wyler*, is approved by the Wisconsin court, as it is also by the late decision of the Connecticut court in *Vickery vs. Ry. Co.*, 89 Atl. 277, cited in support of the conclusions of the opinion.

In judging of the weight to be given the *Curtice* case, as an authority, it should be noted that the decision is by a divided court. Two of the five judges—Barnes, J., and Vinje, J., dissented. Justice Barnes wrote a dissenting opinion in which the authorities bearing on the subject are fully reviewed. He cites a long list of cases as supporting his holding that the amendment was open to the defense of the stat-

ute of limitations, and then remarks that the cases relied on by appellant, with two or three not very important exceptions, are cases where there was a change of beneficiary by amendment, and that such a change is held by nearly all courts not to change the cause of action.

The *Vickery* case, above referred to, decided by the Supreme Court of Connecticut, falls very far short of sustaining the statement with regard to it made in the opinion. The plaintiff in that case was denied leave to amend his petition to show that the plaintiff and defendant, at the time of plaintiff's injury, were engaged in interstate commerce. This was denied on the ground that an allowance of the amendment would result in the bringing of a new cause of action and one which had been lost to the plaintiff by statutory limitation. Defendant, however, pleaded that the plaintiff's injury was sustained by him while he was employed in interstate commerce. The allegations of this defense were admitted. In this condition of the pleadings the case went to a trial to a jury. There was a verdict and judgment for the plainfiff which was affirmed on appeal by the Supreme Court of Connecticut. In the opinion it is said:

> "The trial court erred in withholding from the plaintiff the desired leave to amend, for the reason assigned, but that error can be of no help to him here. The complaint remained unamended and barren of allegations showing the application of the federal statute. The admitted allegations of the third defense, however, brought the pertinent facts upon the record, and supplied the absence of them in the complaint."

While this case as originally brought was, as the opinion assumes, an action under the state law, there can be no possible question but that from and after the filing of the amendments to which the plea of the statute of limitations is here addressed, recovery was sought under the Act of Congress, which was exclusive of all state legislation on the subject. As the Act of Congress gives a right of action which would not otherwise exist, it must of course be accepted in all respects as the statute gives it, and the statute provides that the action must be brought within two years. This provision, then, as has been held by several courts, is not strictly a statute of limitations, but operates as a limitation of the liability itself, as created, being a condition attached to the right to sue at all.

Missouri, Kansas & Texas Ry. Co. vs. Wulf, 226 U. S., 570, 33 Sup. Ct. Rep. 135, is claimed as an authority sustaining the conclusions in the opinion under review. But it will be observed that the only effect of the amendment in the *Wulf* case was to change the capacity in which the plaintiff sued.

It has been quite generally held that an amendment changing the capacity in which the plaintiff brings suit is not a change of the cause of action. The distinction between the *Wulf* case and the case at bar is that in the *Wulf* case, in the original petition, every essential allegation to a recovery under the federal act was set forth, even as to the statement of the measure of damages; while, in the case at bar, the original petition is lacking in essential allegations to make a case under the federal act. In the *Wulf* case there was no departure from fact to fact or from law to law; while in the case at bar, as in the *Wyler* case, the amendment presented a departure from a suit brought under the general rule of master and servant of Iowa, to an action under the federal Employers' Liability Act.

It will doubtless be claimed that the *Wyler* case was overruled or at least discredited in *Taylor vs. Taylor,* 232 U. S. 363, S. Ct. Rep. Vol. 34, page 350. That was an action in which the plaintiff in error was the widow and the defendant in error the father of Howard Taylor who, through the negligence of the railroad company met with an accident which caused his death. The plaintiff in error having been appointed administratrix of the estate of her husband, brought suit to recover damages under the federal Employers' Liability Act, accepted in settlement $5,000. Defendant in error, the father, claimed half the money and brought suit therefor. It was held that the wife was entitled to all of the money as beneficiary of her deceased husband. No other point was decided in the case. Nor was any reference made to the case of *Union Pac. Ry. Co. vs. Wyler.* In the discussion of the question involved, Justice McKenna had occasion to refer to the case of *Mondou vs. New York, N. H. & H. R. Co.,* 223 U. S. 1, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, as holding that the Employers' Liability Act was held to be constitutional and that having been enacted pursuant to a power reserved to Congress, state laws must give away to them. The learned justice refers to the *Wulf* case in the following language:

> "In *Missouri, K. & T. R. Co. vs. Wulf,* 226 U. S. 570, 57 L. Ed. 355, 33 Sup. Ct. Rep. 135, the *Mondou* case was applied. The action was brought by the mother of a deceased employee in interstate commerce under the state statute. The petition was subsequently amended to embrace a right of action by her under the Federal law as the personal representative of the decedent. The amendment was held not to be the commencement of a new action. It was said that notwithstanding the original petition asserted a cause of action under the state statute without making reference to the act of Congress, the court was presumed to be cognizant of the Federal enactment, and 'to know that,

with respect to the responsibility of interstate carriers by railroad to their employees injured in such commerce after its enactment, it had the effect of superseding state laws upon the subject.'"

It will be observed that the writer of the opinion was speaking with reference to the effect of the Employers' Liability Act in superseding state laws upon the subject of the recovery of damages by employees engaged in interstate commerce, and that he was not speaking of the *Wulf* case with the question in mind now under consideration.

Mr. Justice McKenna's statement as to what was held in the *Wulf* case is not as we read the case, an accurate statement, in so far as it bears on the statute of limitations. The *Wulf* case was brought by the plaintiff in her own name and as the sole beneficiary of her deceased son in the Circuit Court of the United States. In the original petition which in all respects stated a complete cause of action under the federal act, reference is made to the laws of the state of Kansas, where plaintiff's decedent was killed and no reference, in terms, was made to the Employers' Liability Act. In the amendment which was filed, she sought to recover as administratrix of her son's estate. The defendant excepted to that portion of the amendment to the petition seeking to make her a party as administratrix because more than two years has elapsed since the death of the deceased, and that because she had brought the suit in her own name, the right of action to prosecute as administratrix was barred. That was the only question of limitation raised in the case. The amendment did no more than change the capacity in which the plaintiff sued.

In *Renn vs. Seaboard Air Line Railway*, 86 S. E. 964-973, in the course of a very able and exhaustive opinion, Mr. Justice Brown of the Supreme Court of North Carolina said:

"The case of *Union Pacific R. Co. vs. Wyler*, 158 U. S. 293, seems to me to be directly in point against the plaintiff's right to amend his complaint. In that case the original complaint set forth a cause of action under the general law of master and servant. The amendment declared under a state statute regulating such action. It was held that this amendment could not be permitted because it constituted a departure in pleading and set up a new cause of action. The principles laid down in this case have been accepted everywhere, and the United States Supreme Court has had frequent occasion to re-examine the case, and its correctness has never been questioned. *Atlantic & Pac. R. Co. vs. Laird*, 164 U. S. 396; *United States vs. Dal-*

cour, 203 U. S. 408; *M. K. & T. R. Co. vs. Wulf*, 226 U. S. 570; *St. L. I. M. & S. R. Co. vs. Hesterly*, 228 U. S. 703."

Speaking of the *Wulf* case, he said:

> "The amendment permitted merely changed the character in which the plaintiff sued from her individual capacity to administratrix. The Supreme Court of the United States held that this was a change in form, and not in substance, and did not change the cause of action as originally alleged."

The original petition did not state a cause of action under the federal act, and hence the bringing of the action and the filing of the petition did not arrest the running of the statute.

> "Where the original petition states no cause of action whatever, it will not arrest the running of the statute of limitations; and an amendment made after the bar of the statute is complete must be treated as filed at the time the amendment is made. A cause of action, being stated then for the first time, cannot escape the bar of the statute of limitations by being filed as an amendment."

(The foregoing is the second syllabus in *M. K. & T. Ry. Co. vs. Bagley, Admr.*, 3 L. R. A. (N. S.) 259, prepared by the court.) In the course of the opinion in the *Badley* case, the Supreme Court of Kansas said:

> "Where an original declaration fails to state any cause of action whatever, and an amended declaration does, upon an issue of the statute of limitations, the amended declaration will be deemed to have been filed, and the action to have been instituted, at the time of the making of such amendment, although such amendment is confined to a more complete statement of the same cause or right attempted to be stated in the original."

Citing *Ill. Cent. R. Co. vs. Campbell*, 170 Ill. 163; *Eylenfeldt vs. Ill. Steel Co.*, 165 Ill. 185; *Selma R. & D. R. Co. vs. Lacey*, 49 Ga. 106; *Phelps vs. Ill. Cent. R. Co.*, 94 Ill. 548; *Lasater vs. Fant* (Tex. Civ. App.) 43 S. W. 321.

In *Foster vs. St. Luke's Hospital*, (Ill.) 60 N. E. 803, it was held that a declaration for death by wrongful act, failing to allege plaintiff's relation to deceased, or that she left surviving a husband or next of kin, or that anyone sustained any pecuniary loss by the death, states no cause of action, so that an amended declaration filed more than two years after the

accident is open to the plea of limitations. After a very full review of the authorities showing the necessity under the compensation statute of Illinois, which is like the federal act in this respect, of alleging and proving that deceased left a widow or next of kin, the opinion of the Supreme Court of Illinois concludes with the statement:

> "We are of the opinion the declaration as originally filed stated no cause of action and that the cause of action stated in the amended declaration is barred by the statute of limitations."

In 25 Cyc. 1309, it is said:

> "Where the declaration states no cause of action whatever, it will not arrest the running of limitations; and an amendment made after the bar of the statute is complete will be regarded as the beginning of the action, in reckoning the statutory period of limitations."

Many cases are cited in support of this text. To the same effect is the case of *City of Kansas City vs. Hart*, 57 Pac. 938. See also other cases cited in the brief.

In *Hughes vs. New York O. & W. Ry. Co.*, 143 N. Y. Sup. 603, where a railroad conductor died pending an action brought by him for personal injuries under the provisions of the state law, it was held that his administrator could not after the expiration of two years from the time of the accident, file as substituted plaintiff, an amended complaint based upon a right of action given by the Employers' Liability Act of April 22, 1908, as amended, which limited actions under the law to those brought within two years from the time the action accrued. In the opinion it is said:

> "The action was not brought under that act, (Act of Congress) but is specifically based on the common law as modified by the statute of the state. An action under the federal law must be begun within two years from the time the cause of action accrued, but after nearly three years it is sought to convert the action under the state law into an action under the federal law, thus extending the statute by a substituted cause of action. On April 5, 1910, the federal act was amended so as to provide "that any right of action given by this act to a person suffering injury shall survive," etc. But the right cannot survive the time limited for its exercise, but when the person to whom the right is initially given elects to proceed under the law of the state, the right to proceed under the federal statute is at least

dormant, and ceases after the expiration of the two years. The federal statute is tendered to him who, entitled, chooses to employ it. He may prefer the law of the state, as the injured person did in the present instance. But such law cannot be exploited, and, upon emergency, the action be changed into one under the federal law. There is not a suggestion of fact in the original complaint indicating intention to avail of the federal statute."

It appears from the statement of the case that it was alleged that the railroad company was operating in New York and Pennsylvania, and that plaintiff was employed as a conductor upon a train which was being run by the defendant along the line of its railroad near Starlight, Pennsylvania. A glance at the map will show that the N. Y. O. & W. Ry. passes through Delaware County, New York, crossing the line into Pennsylvania at Hancock, and thence through Starlight in Wayne County, Pennsylvania, just across the Delaware River which forms the state line. In the original petition it was alleged that defendant railway company was organized under the laws of New York and operated a railroad in various parts of said state and the state of Pennsylvania at the places specified; and that at the date of the accident the plaintiff was in the employ of the defendant as a conductor along the line of its road near Starlight in the state of Pennsylvania. It thus appears that the defendant was an interstate road and that, as the conductor was operating a train on the line passing through Starlight, he must of necessity have been working on an interstate train. Notwithstanding these allegations, it is said by the Supreme Court of New York:

"There is not a suggestion of fact in the original complaint indicating intention to avail of the federal statute."

So in this case, the allegation in the original petition was that the defendant was operating a railroad through various states and that Spellman's run was between Des Moines and Oelwein, hauling a passenger train between Kansas City, Kansas, and Chicago. There being no allegation that he was engaged in interstate commerce or that he left a wife and children surviving him, and the suit having been brought to recover damages to his estate, there is not a suggestion of fact in the original petition indicating intention to avail of the federal statute.

This then is the situation: If it shall be claimed that the original petition stated a good cause of action under the state law, and therefore tolled the statute, the filing of the amendment claiming the right to recover under the federal act was

a departure from law to law and was the setting up of a new cause of action which did not relate back to the commencement of the action and hence was barred by the statute of limitations, more than two years having elapsed since the cause of action arose. If, on the other hand, it shall be claimed that the original petition was intended to state a cause of action under the federal act, it is clear under all the authorities that the statute of limitations had run against the amendment for the reason that the original petition did not state a cause of action under the federal act. Plaintiff must take the one position or the other, and either is fatal to his right to recover upon the petition as amended.

The petition as amended presents a new cause of action, and the amendment is not a mere amplification of the original petition.

This is necessarily true if the original petition can be regarded as an attempt to plead under the federal act. As we have seen, it did not state a cause of action under the federal act, while the petition as amended, does. As no cause of action was pleaded prior to the filing of the amendment, and as the petition as amended did plead a cause of action—it would seem to necessarily follow that the amendment presents a new cause of action and is not a mere amplification of the cause of action originally pleaded.

There are other tests which may be applied which makes it equally clear that the petition as amended presents a new cause of action. When tried by the tests recognized by the court in *Van Patten vs. Waugh*, 122 Iowa, 302, it is readily seen that the amendment presents a new cause of action. The evidence which would have supported the original petition does not make out a case under the petition as amended. The measure of damages is not the same. Upon the original petition the measure of damages would be the loss to the estate on account of the death of Mr. Spellman; that is to say, how much less was his estate worth at the time of his death than it would have been had he lived out his expectancy? The measure of damages in the cause of action presented by the petition as amended, is the pecuniary loss of the beneficiary, i. e., the loss of the money which Mrs. Spellman would have received and enjoyed for her support out of Spellman's earnings during the lifetime of the deceased and of the beneficiary. They were not both subject to the same plea.

The original petition, if it can be viewed as declaring under the act of Congress, was demurrable for the reasons heretofore stated. The petition as amended was not demurrable for failure to allege the existence of the widow, children, parents, or dependent next of kin. Nor would a recovery under the original petition have barred a suit in the widow's behalf under the act of Congress.

The beneficiary is different. Under the original petition, the recovery was for the benefit of the estate. Section 3133 of the Code provides that,

> "When a wrongful act produces death, damages recovered therefor shall be disposed of as personal property belonging to the estate of the deceased, but if the deceased leaves a husband, wife, child or parent, it shall not be liable for the payment of debts."

Under the petition as amended, the recovery made by the administrator was for the benefit, and for the sole benefit, of the persons named in the act; and where no such persons existed there could be no recovery.

In *Atlanta & N. Ry. Co. vs. Hooper*, 92 Fed. 820, decided by the Circuit Court of Appeals for the Sixth Circuit, it was held that where an administrator under the code of Tennessee brought suit to recover damages for the wrongful death of his intestate, averring that he brought the suit for the benefit of one person as the intestate's next of kin, and subsequently substituted in his declaration for that person the name of another as next of kin—this is such a change of the cause of action as causes the statute of limitations to run to the date of the amendment. The opinion in the case was written by Judge Taft and was concurred in by Judges Lurton and Severens.

The decisions of this court cited in the brief support our contention that the petition as amended presents a new cause of action and that the amendment cannot be treated as a mere amplification of the original petition.

II.

THE ORIGINAL PETITION STATED A CAUSE OF ACTION UNDER THE IOWA LAW.

The original opinion in this case will be found reported in Vol. 154 of the Northwestern Reporter at page 1019, Transcript 77. The third paragraph of the opinion deals with the subject of the bar of the statute of limitations. Transcript page 90. Speaking of the subject, it is there said:

> "Assuming that the defense is properly pleaded we are of the opinion that it is not well founded. It is true that in its original form the petition indicates an uncertainty in the mind of the pleader whether plaintiff's right of recovery was under the law of the state or the federal statute and that it was drawn with the thought of making its allegations broad enough to give the action standing upon either theory."

This portion of the opinion on rehearing was withdrawn and a substituted opinion filed which will be found reported in Vol. 157 in the Northwestern Reporter at page 192, Transcript 92. The third paragraph of the original opinion does not now, therefore, constitute any part of the opinion under review. However, in anticipation of claims that may be made by counsel for defendant in error, we here call attention to the case of *St. L. I. M. Y. S. R. Co. vs. Hesterly*, 228 U. S. 702, in which this court holds that "a federal question must be deemed to have been presented with sufficient clearness to sustain a writ of error from the Federal Supreme Court to a state court, where the latter court has held that the question was sufficiently raised, and decided it." In the substituted opinion, the Iowa Supreme Court assumes that plaintiff sought to recover under the statute of the state and alleged a good cause of action. That it developing that deceased was injured while engaged in interstate commerce to sustain a verdict in favor of the administrator under the Federal Act, it was necessary for the plaintiff to allege that deceased was survived by dependent wife or family and it holds that an amendment to the petition adding such necessary averment did not state a new cause of action permitting defendant to successfully interpose a plea of the statute of limitations. It is anticipated that defendant in error will take the position that if the Iowa court was wrong in its view of the law above expressed, it was right in its construction of the original petition and that being true, the decision of the lower court ought not to be reversed because the case was rightly decided, although a wrong reason was given for holding the plea of the statute not well taken. It is only because of this that we here venture to present our views on the subject of the Iowa court's construction of the original petition.

The original petition stated a good cause of action under the state law. The petition as amended stated a good cause of action under the Federal Act. The original petition does not indicate any uncertainty in the mind of the pleader as to whether the plaintiff had a right to recover under the state or federal statute. It contains every allegation essential to recover under the state law. Nothing is omitted.

On the other hand, there is nothing to indicate that there was in the mind of the pleader any thought of recovery under the federal statute. It is true that it is alleged that defendant is a corporation for pecuniary profit and that it was engaged in owning and operating a railway through the state of Iowa, Illinois, Minnesota, Missouri and Kansas. It is further alleged that John J. Spellman was an employee of the defendant railway company as an engineer; that he was drawing a passenger train between Kansas City and Chicago, his run being between Des Moines and Oelwein, Iowa. If there had been any thought in the pleader's mind of framing a petition

that would be good under the federal act, he would certainly have followed these allegations with the statement that defendant was engaged in interstate commerce, and that Spellman was performing an act of interstate commerce.

It is said that defendant's counsel must have understood that the petition was drawn to permit a recovery under the federal law, because of a demurrer filed. But the trial court overruled the demurrer, holding that defendant's counsel was wrong in attempting to put such construction on the pleading and sustaining plaintiff's contention that it stated a cause of action under the state law. Precisely such allegations will be found in most well drawn petitions prepared before the federal act was passed.

If counsel in drawing the original petition had been uncertain as to whether his remedy was under the state or federal law and had entertained the idea with which the opinion credits him, of drawing the petition broad enough to give the action standing on either theory, how could he possibly have omitted every essential allegation to make the action one under the federal act, while omitting not a single allegation to give it standing under the state law? If such had been his thought, why did he fail to allege that Spellman left a widow who was dependent upon him for support and to whom he contributed his earnings? Why is there an omission of the allegation of pecuniary loss to Mrs. Spellman instead of a claim of damages to the estate? Why was judgment asked for damages to the estate instead of Mrs. Spellman's pecuniary loss? If, as stated in the opinion, the pleader had in mind in the preparation of the petition that plaintiff might have a right of recovery under the federal statute and that he deliberately undertook the remarkable feat of drawing a petition broad enough to give it standing either under the state or federal law, it is not too much to assume that in preparing the petition he had the federal act before him or at least had its provisions in mind. How, then, we ask again, could the pleader in carrying out the purpose with which he is credited, have failed to make a single allegation which would give the case standing under the federal statute?

To sustain the position taken, Mr. Justice Weaver points to the allegations as to the nature of defendant's business and plaintiff's occupation, but he does not claim that these allegations are not proper allegations in a well-drawn petition under the state laws. We think it cannot be questioned that they were proper, indeed, essential, to a recovery under the state law. It was necessary to allege that defendant was a corporation engaged in the operation of a railroad. To be sufficiently specific, it was necessary to allege *where* it was operating a railroad. It was necessary to allege that Spellman was the defendant's employee and the nature of his employment. It was necessary to allege that he was an engi-

neer and that at the time of his injury he was engaged in his business as such. And to be sufficiently specific, it was necessary to allege the *particular train his engine was hauling and where his run was.*

Assuming that the only question was as to whether the petition stated a good cause of action under the state law and that defendant had filed a motion to strike out the allegations referred to as immaterial and redundant, can there be any doubt but that such a motion would be rightfully denied, and this for the reason that these allegations were all proper, if not absolutely necessary to a good pleading of the cause of action under the state law.

Here, then, is the situation: A petition is drawn, every allegation of which, if not absolutely essential, is at least good practice in an action brought under the state law. There is not in the entire pleading a single allegation that indicates a purpose to plead under the federal act. How, then, can it be said that the pleading indicated an uncertainty in the mind of the pleader as to whether the right of recovery was under the state or federal law and that therefore he drew his pleading with the thought of making it broad enough to give the action standing upon either theory? If would never occur to us to charge a lawyer of counsel for plaintiff's experience with undertaking to so frame a petition as to give an action standing under both the state and federal law. We believe such a feat would be impossible and that no experienced lawyer would undertake it. The Iowa court was unquestionably right in the assumption in the substituted opinion that the original petition was drawn under the state law and that the amendments filed after the lapse of two years were intended to be and were in fact a departure from law to law. For this reason the amendments do not relate back to the time of filing the original petition, and hence were the creation of a new cause of action which had been long barred by the limitation period of the federal act.

III.

THE INSUFFICIENCY OF THE EVIDENCE.

DEFENDANT IN ERROR'S TESTIMONY GOES NO FURTHER THAN TO SHOW THE OPEN SWITCH, THE RESULTING DERAILMENT AND CONSEQUENT FATAL INJURY TO MR. SPELLMAN.

To support his allegations that the misplaced switch was the result of negligence on the part of plaintiff in error, defendant in error introduced the testimony of James Sherriff. Transcript of Record, 6-7-8-9.

He testified that he was a passenger on train No. 4 and was sitting in the smoking car at the time of the derailment. From 1902 to 1907 he was a machinist in the employ of the Chicago Great Western Railroad Company. The train left the track at the switch known as the high switch, at Oelwein, running at a fair rate of speed. The track at the switch point was perfect. The switch point was not against the rail on either side. There was enough space to allow the flange to pass through freely—about an inch to an inch and a half. The lever was raised so that the switch could be turned either way, and the lock hanging in the eye. The lock was not locked, and the handle stood up about one-third of the way. The target of the switch showed an angle of about forty-five degrees. The photograph Exhibit "C" shows the switch stand as it stood, or a part of it. It is shown on the south side of the track on the main line. The lever is shown, in the photograph Exhibit "C" to be down and locked. Immediately after the wreck it was nearly one-half way up. The lever in that position would be above the eye of the lock. At the top of the switch is a square about three or four inches deep. You have to raise your lever up high enough in order to get this out of the square before you can turn it around to throw the track. *When the lever is placed in such a position as to be low enough that the eye goes through the lever, and the lock is then inserted in the eye, either locked or unlocked the tracks could not be moved before the lock was taken out of the eye and the lever raised.* When the switch is properly set to conduct trains past it on the main line, then the switch point of the north rail of the "Y" track which lies between the two rails of the main track is moved away from the north rail so that the flanges go through. The point of the rail of the main track, which in this instance would be the south rail of the main track, would be snug against the right hand rail of the "Y" track. In order to transfer a train from the main line to the "Y" track, the lever would be raised to the position stated and turned to the south. In doing that, this point on the left hand rail of the "Y" track, which lies between the rails of the main track, would go snugly against the north rail and there would be an opening in the south main rail, so that the flanges would go through the rails and follow the right hand rail of the "Y" or side track. Exhibit "B" is a correct representation of this switch stand and the vicinity of it. "I examined the lock on this switch stand within ten minutes after the accident. The lock was hanging in the eye; there was a chain attached to it.

This lock was locked and unlocked with a key that I saw there after the wreck. It was three years before the accident that I worked there at Oelwein. After that I had nothing to do with the yards. The switch I speak of was out very close to half a mile from the depot at Oelwein on the southwest main line, being the line passing through Waterloo and com-

ing to Des Moines. It is the first switch you come to as you approach Oelwein. At the point where the switch is, there is the main track from the southwest leading into town, and then this "Y" leading off to the right. To throw the switch for the "Y" you raise the lever pointed out in the photograph. In raising the lever you have to raise this weight that I spoke about, this square that sets down in there. *It takes some strength to raise up on that lever.* Raising the lever doesn't throw the switch. To throw the switch from the main line over to the "Y", you unlock the lock, pull up the lever, raise it right up and swing it around to the right one quarter turn. You have to get it so the square comes out of the socket. When I examined this switch stand, I found that the switch points were not thrown clear over either way. They were just the same as though the lever had been moved only part way around. They were neither against one rail nor the other, and the result would be that the flange of the trucks would go between them. I have had keys thrown to me at times while working for the company. The trainmen, the switchmen, the section foremen and the hostlers that take the engines out on the road had keys."

S. E. Young testified. Transcript of Record 9-10-11.

He was familiar with the tracks of the Chicago Great Western Railroad Company in the vicinity of the first switch going into Oelwein. The photographs Exhibits "A" and "B" show the tracks in and about the switch stand correctly.

After the accident, he examined the switch to see what shape it was in. The handle that they used to turn the switch for what they call the high "Y" on the main line, was from six to eight inches above the socket, the fastening where they lock it, and to one side. Exhibit "C" is a correct photograph of a portion of the switch stand as he saw it. When he first examined the lever, there was a padlock on the stand. It was in the little hole there, only the lock was hanging down in the eye.

H. N. Hansen testified. Transcript 11.

Exhibits "A", "B" and "C" were taken about two weeks after the accident. In Exhibit "A" the camera was set from the switch about 200 feet southwest of the switch stand on the main line. In Exhibit "B" the camera was standing about sixty feet southwest of the switch stand on the main line. In Exhibit "C" the camera was standing within four or five feet of the switch stand between the rails of the main line.

Fannie L. Spellman testified. Transcript 11-12.

She was the wife of John J. Spellman and had been married thirty-five years. It was admitted that plaintiff was the legally appointed, qualified and acting administrator of de-

ceased's estate, and that deceased's expectancy of life was 13.47 years.

The above and foregoing is all of the evidence introduced by defendant in error.

IV.

DID THE TESTIMONY INTRODUCED BY DEFENDANT IN ERROR RAISE A PRESUMPTION THAT THE DISPLACED SWITCH WAS DUE TO THE NEGLIGENCE OF PLAINTIFF IN ERROR?

The Supreme Court of Iowa held that the defendant in error's testimony "makes a case for the application of the maxim *res ipsa loquitur* as the same is now generally understood and applied, and constitutes a *prima facie* showing sufficient to sustain a verdict in plaintiff's favor."

The reasoning of Mr. Justice Weaver, the writer of the opinion under review, does not sustain the conclusions announced. After citing several cases, it is said:

> "In a few jurisdictions there has been a disposition to restrict its application to cases between passenger and carrier and deny its application as between master and servant, but the better and much the greater weight of modern authority, while in some degree narrowing the scope of the rule in the latter instance, does not deny its applicability in favor of the servant in a proper case."

In support of this statement, the writer of the opinion cites, among other cases, *Huggard vs. Glucose Works*, 132 Iowa, 724. That was a case in which plaintiff, a servant of the defendant corporation, was injured by the falling of a piece of gas pipe through an opening on the floor under which he was passing. While the court, without discussing the rule, holds that the maxim *res ipsa loquitur* applies to the case, nevertheless it holds that:

> "Aside from the maxim to which we have referred, we think there was enough testimony to take the case to the jury upon the questions as to defendant's negligence, and as to its responsibility for plaintiff's injuries."

The statement as to the application of the maxim is dictum. It is further said in the opinion under review:

> "It may also be said in this connection that the principal reason formerly advanced in support of the argument against the application of the maxim in favor of a servant against his master was that the negligence, if any could be presumed, was as likely to be that of a fellow-servant as of a master, but where, as in this state, the fellow servant rule has been abolished in favor of those employed in operating a railway, the force of the argument for such restriction is correspondingly lessened."

While this has been said in a few cases in which it was held the maxim does not apply to cases between master and servant it is not the true reason for denying the application of the maxim in such cases. It is a salutary rule of law universally recognized that an employee assumes the ordinary risks of his employment. The application of the *res ipsa loquitur* maxim to cases between employee and employer *completely nullifies the rule that an employee assumes the ordinary risks of his employment.* Take the instant case as an illustration. Mr. Spellman assumed as one of the risks of his employment, the displacing of the switch by an inter-meddler or some person for whose acts the defendant is not liable. If the fact of the displaced switch and the resultant derailment was sufficient to raise a presumption of negligence on the part of the defendant and if, as the opinion holds, that presumption cannot be overcome as a matter of law by testimony on the part of the defendant, no matter how clear and conclusive, liability is fastened upon the defendant in a case where it is free from negligence. In other words, plaintiff's recovery rests not upon evidence establishing negligence but upon mere presumption.

In the opinion under review, it is further said:

> "We do not overlook the *Brownfield* case, 107 Iowa, 254, the *O'Conner* case, 83 Iowa, 105, 48 N. W. 1002, the *Helgeson* case, 148 Iowa, 587, and others of that class. None of these cases are inconsistent with the foregoing discussion. None undertakes to say more than that, in all cases where a servant charges his master with negligence the burden is always upon him to make good by a preponderance of evidence, and that mere proof of the accident with nothing more is insufficient for that purpose."

Justice Weaver's understanding of what was held in these cases does not accord with the views of Mr. Justice Hook as to what the cases hold as expressed in *Chicago & North Western Ry. Co. vs. O'Brien,* 132 Fed. 1593, 67 C. C. A. 421. These cases are all cited by Justice Hook as supporting the conclu-

sions announced in the *O'Brien* case that the *res ipsa loquitur* maxim does not apply to cases between master and servant.

In the *O'Brien* case, Justice Hook says:

> "The rule *res ipsa loquitur* does not apply to a case where a locomotive fireman was injured by the derailment of an engine in which he was riding, caused by a broken axle."

Citing *Brownfield vs. Ry. Co.*, 107 Iowa, 254.

The learned writer of the opinion under review takes the position that it is the settled law in all cases where a servant charges his master with negligence that the burden is always upon him to make good by a preponderance of evidence. To that proposition he gives his unqualified adherence. We submit that the view thus expressed is not consistent with the holding in the opinion under review; that the mere fact of a derailment caused by an open switch raised a presumption of negligence which cannot be overcome by any weight of testimony. Under the doctrine of the opinion under review, negligence is established, not by evidence but by a mere presumption.

Without attempting to discuss all the cases which hold that the maxim *res ipsa loquitur* does not apply to cases between master and servant, we content ourselves with calling the court's attention to some of them which appear to settle the question in the federal courts, with the addition of a few cases from other jurisdictions.

E. M. Patton, plaintiff in error vs. Texas & Pac. Ry. Co., decided by this court in January, 1901, 179 U. S. 658, 21 S. C. Rep. 275, was an action brought by a locomotive fireman in the employ of the defendant railroad company to recover damages for personal injuries caused by the step of his engine turning as he was getting off, resulting in throwing him under the engine so that the wheels passed over his right foot. He alleged that the step turned because the nut which held it was not securely fastened; that the omission to have it so fastened was negligence on the part of the company, for which it was liable. In the opinion which is by Mr. Justice Brewer, it is said:

> "That, while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely (*Stokes vs. Saltonstall*, 13 Pet. 181, 10 L. ed. 115, *New Jersey River & Transp. Co. vs. Pollars*, 22 Wall. 241, *Gleeson vs. Virginia Midland R. Co.*, 140 U. S. 435) a dif-

ferent rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence.

Texas & P. R. Co. vs. Barrett, 166 U. S. 617, 17 S. C. Rep. 707. That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

Texas & Pac. Ry. Co. vs. Barrett, 166 U. S. 617—17 S. C. Rep. 707, was a case in which the foreman in charge of a switch engine was injured by the explosion of another engine with which he had nothing to do. The court approved the charge of the trial court which embodied the rule "that the mere fact that an injury is received by a servant in consequence of an explosion will not entitle him to a recovery, but he must, besides the fact of the explosion, show that it resulted from the failure of the master to exercise ordinary care either in selecting such engine, or in keeping it in reasonable safe repair."

Northern Pacific Ry. Co. vs. Dixon, 139 Fed. 737, 71 C. C. A. 555, was decided by the Circuit Court of Appeals of the 8th Circuit in 1905. The action was for damages by the administratrix of the estate of Chauncey A. Dixon, for the death of her son, which she alleged was caused by the negligence of plaintiff in error. From the opinion we quote:

"But the doctrine, '*res ipsa loquitur*', is inapplicable to cases between master and servant brought to recover damages for negligence, because there are many possible causes of accidents during service, the risk of some of which, such as the negligence of fellow servants, *and the other ordinary dangers of the work*, the servant assumes, while for the risk of others, such as the lack of ordinary care to construct or keep in repair the machin-

ery or place of work, the master is responsible. The mere happening of an accident which injures a servant fails to indicate whether it resulted from one of the causes the risk of which is the servant's, or from one of those the risk of which is the master's; and for this reason it raises no presumption that it was caused by the negligence of the latter. In such cases the burden of proof is always upon him who avers that the negligence of the master caused the accident to establish that fact, and a naked finding, as in this case, that the accident occurred and that the servant was guilty of no negligence which contributed to cause his injury, is insufficient to sustain this burden, for there are many other causes than the negligence of the master and that of the servant, such as the negligence of fellow servants and latent and undiscoverable defects in place or machinery, which may have produced it."

Citing numerous cases, including *O'Conner vs. Ry. Co.*, 83 Iowa, 105, *Brownfield vs. Ry. Co.*, 107 Iowa, 254.

"The happening of the accident and the absence of contributory negligence of the servant constitute no substantial evidence of the causal negligence of the master, and are insufficient to support a finding or judgment against him for the injury which resulted from it."

C. & N. W. Ry. Co. vs. O'Brien, 132 Fed. 593—67 C. C. A. 421 was a case decided by the Circuit Court of Appeals of the Eighth Circuit in 1904. O'Brien, an express messenger, was fatally injured by the derailment near Boone, Iowa, of the fast mail train of the Chicago & Northwestern Ry. Co. Suit was brought by Mary O'Brien as administratrix of his estate to recover damages. From the opinion of Mr. Justice Hook we quote:

"It is familiar doctrine that in cases between employee and employer the law does not presume carelessness or negligence on the part of the latter. And the presumption in the case before us is that due care was exercised by the company in respect of the condition of the engine, cars, and railroad track, and also that those in charge of the operation of the train performed their duty. No logical distinction can be made in the application of this presumption of performance of duty between the mechanical condition of the engine and cars on the one hand and the operation of the train upon the other. The burden of proof is upon him who asserts that the employer was negligent. This

burden cannot be discharged by mere proof of the occurrence of the accident. To hold otherwise would be to ignore the well-established and long settled difference between the rules which govern in passenger cases and those which apply when the relation is that of employer and employee. The doctrine *res ipsa loquitur* is not applicable in cases of the latter character."

After citing and quoting from *Patton vs. Texas & Pac. Ry. Co.* and *Texas & Pac. Ry. Co. vs. Barrett*, the writer of the opinion continues:

"In *O'Conner vs. Ry. Co.*, 83 Iowa, 105, the court said that 'the mere happening of the derailment or the accident would not show negligence'; citing *Baldwin vs. Railway Co.*, 68 Iowa, 37, *Case vs. Ry. Co.*, 64 Iowa, 762; *Gandy vs. Ry. Co.*, 30 Iowa, 420. In *Bowen vs. Ry. Co.*, 95 Mo. 268-8 S. W. 230, the court said:

'As between master and servant, the mere fact that an appliance proves to be defective, and the servant is injured, does not make out a *prima facie* case for the servant of negligence on the part of the master.'

In *Brymer vs. Railway Co.*, 90 Cal. 497, 27 Pac. 371, an instruction was asked which embodied a clause that 'the mere fact that an accident occurred by which the plaintiff was injured does not fix the liability, or even raise a presumption that the defendant was at fault in providing machinery or appliances for the labor in which the plaintiff was engaged.' Its refusal was held to be sufficient cause for a new trial.

In *Huff vs. Austin*, 46 Ohio St. 386, 21 N. E. 864, 15 Am. St. Rep. 613, a steam boiler exploded, injuring an employee of the owner, and it was held that the mere happening of the accident was not evidence of negligence.

In *Wormell vs. Railroad Co.*, 79 Me. 397, 10 Atl. 49, 1 Am. St. Rep. 321, the court said:

'There is no presumption of negligence on the part of the defendant from the fact alone that an accident has happened, or that the plaintiff has received an injury while in the employment of the defendant.'

In *Mining Co. vs. Kitts*, 42 Mich. 41, 3 N. W. 240, an employee was injured by the fall of a bridge, the cause of which was unexplained. The court held that, while it might be guessed or surmised that there was negligence somewhere, it did not extend beyond conjecture, and that, if a master was to be held liable under such circumstances, the rule that an employee assumes the

ordinary risks of his employment would be wholly done away with.

In *Baltimore Elevator Co. vs. Neal*, 65 Md. 438, 5 Atl. 338 the court said:

'The jury should not have been allowed to infer from the simple fact of the happening of the accident that there was negligence or unskillfulness on the part of the captain of the tug. That is justified by no decided case, and is in conflict with the well-established principle that it is incumbent upon the plaintiff in this class of cases to establish by affirmative proof that the injury received by him was caused by the negligent or unskillful act of the fellow-servant.'

In *Brownfield vs. Railway Co.*, 107 Iowa, 254, 77 N. W. 1038, it was held that the rule *res ipsa loquitur* did not apply to a case, where a locomotive fireman was injured by the derailment of an engine on which he was riding caused by a broken axle.

In *Grant vs. Railroad Co.*, 133 N. Y. 659, 31 N. E. 220, an employee of the railroad company was injured by a defective drawhead. The court said that it may have been broken on account of a latent defect beyond the reach of inspection, and added:

'Whether it did or not we do not know, and there is no evidence upon the subject. No facts are shown from which the cause of the accident can be more than guess at. There is food for speculation or wonder, but there is no evidence as to the cause.'

The same rule is announced in *Hodges vs. Kimball*, 104 Fed. 745, 44 C. C. A. 193; *Bowes vs. Hopkins*, 84 Fed. 767, 28 C. C. A. 524; *Peirce vs. Kile*, 80 Fed. 865, 26 C. C. A. 201; *Ry. Co. vs. Thompson*, 70 Fed. 944, 71 Fed. 531, 17 C. C. A. 524; *Whitcomb vs. Ry. Co.*, 125 Mich. 572, 84 N. W. 1072; *Higgins vs. Fanning*, 195 Pa. 599, 46 Atl. 102; *Redman vs. Lumber Co.*, 96 Mich. 545, 55 N. W. 1004; *Railway Co. vs. Cook's Admr.*, 24 Ky. Law Rep. 2152, 73 S. W. 765; *Ouillette vs. Overman Wheel Co.*, 162 Mass. 305, 38 N. E. 511; *Railroad Co. vs. Kellogg*, 55 Neb. 748, 76 N. W. 462.

If in this very case the derailment of the train had in fact been caused by some defect in the engine or cars beyond the reach of that ordinary diligence and care in selection and subsequent inspection which the railway company owed to the deceased—and there is no doubt but that such defects do at times exist—a presumption of negligence arising from the accident itself might naturally result in imposing upon the company a responsibility for an undiscoverable defect. Bearing in mind the relation of the express messenger to the company, and the rules of law which are ap-

plicable thereto, it is clear that it was entitled to the instruction requested, in order that it might be protected from such a contingency; and, not only that, but also because the fact of accident did not raise a presumption of excessive speed. The refusal of the trial court to give the instruction was erroneous."

Midland Valley R. Co. vs. Fulgham was a case decided by the Circuit Court of Appeals, of the Eighth Circuit in 1910. The action was brought by plaintiff as administrator of the estate of E. C. Pogue, to recover damages for the death of said Pogue, alleged to have been due to the negligence of the defendant. Pogue was caught between cars in the train of which he was conductor. It was charged that the lift pin lever of the coupler would not open the automatic coupler, and therefore the latter would not couple automatically by impact without the necessity of an employee going between the cars to effect the coupling; and negligence was charged against the company because of the alleged defective condition of the coupler. After alleging that "the law which governs a case of this nature is nowhere better stated than by Mr. Justice Brewer in *Patton vs. Texas & Pac. Ry. Co.*, 179 U. S. 658, 663, 21 Sup. Ct. Rep. 275, and quoting largely from the opinion, the writer of the opinion, Mr. Justice Sanborn, continues:

"The doctrine of *res ipsa loquitur* is inapplicable to actions between employers and employees for negligence or other wrongs. The happening of an accident which injures an employee raises no presumption of wrong or negligence by the employer. *Chicago & Northwestern Ry. Co. vs. O'Brien*, 67 C. C. A. 421, 424, 426, 132 Fed. 593, 596, 598; *Northern Pacific Ry. Co. vs. Dixon*, 139 Fed. 737, 740, 71 C. C. A. 555, 558; *Cryder vs. C. R. I. & P. Ry. Co.*, 81 C. C. A. 559, 561, 152 Fed. 417, 419.

Conjecture is an unsound and unjust foundation for a verdict. Juries may not legally guess the money or property of one litigant to another. Substantial evidence of the facts which constitute the cause of action in this case of the alleged defect in the lift pin lever and the coupler is indispensable to the maintenance of a verdict sustaining it. *Missouri, K. & T. Ry. Co. vs. Foreman*, 98 C. C. A. 281, 174 Fed. 377, 383; *Kern vs. Snider*, 76 C. C. A. 201, 145 Fed. 327; *Spencer vs. Ry. Co.*, 105 Wis. 311, 81 N. W. 407; *Thomas vs. Railroad Co.*, 148 Pa. 180, 23 Atl. 989, 15 L. R. A. 416; *Hyer vs. Janesville*, 101 Wis. 371, 77 N. W. 729."

Cryder vs. C. R. I. & P. Ry. Co., 152 Fed. 418, 81 C. C. A. 559 is a case decided by the Circuit Court of Appeals of the Eighth Circuit. In the opinion it is said:

> "The doctrine *res ipsa loquitur* is inapplicable to cases between master and servant brought to recover damages for negligence. *Patton vs. Texas & Pac. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *C. & N. W. Ry. Co. vs. O'Brien*, 67 C. C. A. 421, 132 Fed. 593; *Northern Pac. R. Co. vs. Dixon*, 139 Fed. 737, 71 C. C. A. 555.
>
> The servant assumes the ordinary risks and dangers of his employment which are known to him and those which would be obvious to one of ordinary prudence in similar circumstances. One of these risks is that which arises from latent defects, which the ordinary care of the master may not discover, in the place, articles, and machinery with which the servant works. The failure of the master to find and remove such latent defects, which ordinary care is unable to discover, constitutes no negligence on his part, because the limit of his duty is to exercise reasonable care, and the discovery and repair of such defects falls without that limit.
>
> There was no substantial evidence that the injury involved in this case was caused by any negligence of the defendant, and the court below properly directed a judgment in its favor."

In *Wormell vs. Maine Cent. R. Co.*, 39 Me. 397, 10 Atl. 49, it is said:

> "There is no presumption of negligence on the part of the defendant from the fact alone that an accident has happened, or that the plaintiff has received an injury while in the employment of the defendant. In the long line of decisions, both in this country and England, from *Priestley vs. Fowler*, 3 Mees. & W. 1, to the present time, it has been held that the mere fact of the relationship of master and servant, without a neglect of duty, does not impose upon the master a guaranty of the servant's safety, but that the servant, of sufficient age and intelligence to understand the nature of the risks to which he is exposed, engaging for compensation in the employment of the master, takes upon himself the natural, ordinary and apparent risks and perils incident to such employment. *Coolbroth vs. Maine Cent. R. Co.*, 77 Me. 167; *Nason vs. West*, 78 Me. 257, 3 Atl. 911."

In *Huff vs. Austin*, 46 Ohio St. 386, 21 N. E. 864, it is held by the Supreme Court of Ohio in an action brought by an employee against his employer for damages resulting to him from the explosion of a steam boiler, that the mere fact of the explosion did not raise a *prima facie* presumption of negligence on the part of the defendant.

In *Grant vs. Pennsylvania & N. Y. Canal & R. Co.*, the New York Court of Appeals held that in an action against a railroad company for personal injuries to an employee by reason of the breaking of a defective drawhead, where the evidence leaves it just as probable as not that the defect may have been a latent defect, which no inspection would have reached, a judgment for plaintiff cannot be sustained.

In *Brymer vs. Southern Pac. Ry. Co.*, 90 Cal. 497, 27 Pac. 371, it was held by the Supreme Court of California that in an action by a servant against the master for injuries caused by the breaking of a chain, it was error to refuse an instruction that the master was not an insurer of the servant, and was not bound to provide machinery or appliances which were absolutely safe; that he was bound to use only reasonable and ordinary skill and diligence in procuring safe machinery; and that the mere fact that an accident occurred did not raise the presumption that the master was at fault in providing such machinery or appliances.

Kansas City Southern Ry. Co. vs. Cook, decided by the Supreme Court of Arkansas, reported in 100 Ark. 467, 140 S. W. 579, was an action brought by a brakeman to recover damages for personal injuries under the Employers' Liability Act. In the opinion it is said:

> "This court has repeatedly decided, in construing the statutes of this state concerning liability of railroad companies for damages that a *prima facie* case of negligence is made against a railroad company by proof of injury caused by the running of a train. But this rule has never been applied in favor of an employee who was injured while engaged in the operation of the train which caused the injury. To give the rule such an application would make it possible for an employee, responsible for the running of the train, to create, by his own negligent act, a situation which would raise in his own favor a presumption of negligence against his employer. * * * This court has steadily adhered to the rule announced many years ago that, in cases of this character, there is no presumption of negligence on the part of the master, and that it devolves upon the injured servant to show, not only that the appliances furnished were defective, but that the master had notice of the defect."

Before closing this branch of the argument, we desire again to call attention to the statement in the opinion under review, that the *Brownfield* case, 107 Iowa, 254, the *O'Conner* case, 83 Iowa, 105 and the *Helgesen* case, 148 Iowa, 587, are inconsistent with the foregoing discussion. In making this statement, we submit the court is in error. The *Helgesen* case is in principle, very much like the instant case. The plaintiff was an employee of the defendant corporation which was operating a cold storage warehouse in Mason City. A freight elevator had been installed by the company, which was operated by electric power. On the 1st of December, 1906, the plaintiff, under orders of the general manager, was operating the elevator, and while so doing it is claimed the general manager moved or caused the said elevator to be moved without warning to the plaintiff, as a result of which he was injured. In the course of the opinion it is said:

> "This appeal presents but two matters which will be considered. One is the sufficiency of the testimony to show that O'Keefe started the elevator, and the other the liability of the defendant for the negligence of O'Keefe in the event it be found that he started the elevator without warning. The testimony shows that O'Keefe was defendant's general manager, and had charge of the business at the warehouse when the accident occurred, and it also shows that he properly promulgated rules with reference to giving warning before any of the employees should attempt to move the elevator. It is claimed, however, that he himself violated the rules and started the elevator without giving any warning, thus causing the injury of which plaintiff complains. There is no direct testimony as to what started the elevator to move. Plaintiff testified that he did not do it, and O'Keefe was equally positive that he did not. In the building at the time were Griffith, defendant's engineer and E. B. Higley, president of defendant company, in addition to plaintiff and O'Keefe and it is not claimed that either Griffith or Higley started the elevator. * * * As already stated, O'Keefe and the other men present stated emphatically that they did not start the elevator. No one seems to know just what caused the elevator to start; and under the issues and the instructions the jury was bound to find that O'Keefe was the man who did it. The only justification for such a finding is a presumption that someone must have started it, and that as O'Keefe was at a place where he might have started it, he is the man who did it, although it is conceded that plaintiff himself was more nearly in a position to start it than anyone else. The doctrine *res ipsa loquitur* does not apply to the case,

and the trial court did not submit the issue on that theory. As the accident may as well have happened from some cause for which defendant was not responsible as from a cause for which it was liable, the mere starting of the elevator affords no proof of defendant's negligence. We are constrained to hold that plaintiff did not make out a case on the theory on which it was presented to the jury."

The *Helgesen* case appears to us to be directly in line with the instant case. Here the evidence shows that it was a misplaced switch that caused the derailment; there it was shown that it was the starting of the elevator without warning to the plaintiff that caused his injury. Here there is not a scintilla of evidence that the switch was misplaced by any employee of the defendant; there the evidence shows that the plaintiff did not start the elevator, and there was no evidence that it was started by O'Keefe. O'Keefe was in a position where he might have started the elevator, as was also the plaintiff. Here it is shown that there was no employee of the defendant in a position to have misplaced the switch. The doctrine *res ipsa loquitur* it was held did not raise a presumption that the elevator started through the negligence of any one for whose acts the defendant was responsible and did not apply to the case. Nor in the instant case are the facts such that an inference could properly be drawn therefrom that the switch was left open by the negligent acts of defendant's employees. There is no charge that the defendant was negligent in not having the switch locked, nor that it was left unlocked by any employee of the defendant. Switch keys had been distributed freely among numerous employees of the company for years and they might easily have come in the possession of persons who had formerly been but were no longer employees of the company. Besides, it appears from the uncontroverted evidence that the lock could be opened readily without a key by a jerk upon the chain attached to the lock, as we have pointed out in a prior division of this argument. There was no evidence submitted by the defendant in error tending to show that the switch was opened by any employee of the defendant. The *Helgesen* case appears to us, therefore, to be on all four's with the case at bar. In view of this fact and in view of the fact that it is there expressly held that the maxim *res ipsa loquitur* does not apply, the case being one in which the servant sought to recover damages from the master, the statement that there is nothing "inconsistent in the case with the foregoing discussion" could only have resulted from a misconception of what the case held.

V.

PLAINTIFF IN ERROR'S TESTIMONY SHOWS WITHOUT CONFLICT THAT IT WAS NOT GUILTY OF THE NEGLIGENCE CHARGED.

Plaintiff in error, after a motion to direct a verdict in its favor had been overruled (Transcript 13), introduced the following evidence:

P. B. Vermillion testified. Transcript 13-19.

That he was superintendent at Oelwein and that Oelwein was the hub of the Great Western System. The divisions centering there are from Chicago, St. Paul, Omaha and Kansas City. He learned of the accident to Mr. Spellman about the time it happened, while standing on the station platform. The switch where the derailment took place was the most southerly switch in the yards. It connected the "Y" track that runs from the southern division over to the main line division going to Chicago. The southern division is the line that runs from Oelwein to Kansas City, passing through Des Moines. The switch is perhaps half a mile from the depot. There are no buildings around where the switch is; everything is clear. It is out in the country from the city. A train came into Oelwein a short time before the accident. It was an extra train consisting of an engine and a caboose. It came off the southern division running from Des Moines to Oelwein. It pulled into Oelwein about fifteen or eighteen minutes before the accident. It was required to pass over this same switch. Between the time the engine and caboose came over this switch, until the passenger train that Mr. Spellman's engine was hauling, there were no trains over the line at this point to my knowledge.

There were four switch engines in the yards at Oelwein. The switching was done mainly in the new and old yards which led up parallel with the main line between Chicago and St. Paul, west from half a mile from the point of this accident to about two miles away. There were some few industry tracks in the vicinity; seldom used. When one comes from the south up on the main line to the principal portion of the town, this "Y" track went around over to the Chicago division. About half way up on the "Y" track was a switch that was used by the Standard Oil people as an unloading place. They got a car probably once a week or once in two weeks.

Off the main track, a little above, there was another track used for storing bad order cars. There were two tracks in there that branched off the main line about two or three hundred feet from where the accident happened, and followed

the main line up to the station. We used them for bad order cars.

The switch engine is handled by an engineer, fireman, foreman and two assistant helpers making five in all. On the date of the accident, none of these switching crews were doing work in the vicinity where the derailment took place.

This "Y" track was used principally for turning passenger trains. A train would come in from the southern division that had to be reversed. We would take it around this "Y" and reverse it, and put it back up to the station again. That was done once after the arrival of this train that was derailed, and once about midnight or along two or three o'clock in the morning, with some equipment off other trains that arrived during the night. With the exception of this oil house switch, we hardly ever used that track.

No. 4 is the train that Mr. Spellman met his death on. In turning this train, it would be backed down on the main Chicago line until you come to the switch leading into the "Y" and then follow the "Y" over onto the main track of the southwest division, then it would come through this switch where the accident occurred and back to the station; and then it would be in proper position to return south again. If the switch was only partially turned so that the switch points were not lined up for the main line but only partly open it would cause a derailment. In order that the cars would take the main line, the points must be properly closed against the stock rail.

When I heard of the accident, I immediately went down. I had been standing on the platform waiting for the arrival of the train which was a few minutes overdue. I found that we had a very serious derailment. Our first duty was to ascertain the cause of the derailment. I found that the engine had struck an open switch. I ascertained the position of the switch points. The switch point on this side should have been right up close to what we call the stock rail, that is the rail that goes along the side track. The other switch point would have been a little ways from the other main rail on the other side. We generally use about four or five inches clearance between these stock rails and the point of the switch. The switch had been thrown around so that the wheels of the engine would strike between the two points. They would follow the rails down twelve or fourteen feet and then drop on to the ground because there would be nothing to hold them in position: and by striking these open points it caused the derailment. The switch stand was thrown at pretty nearly the danger position. I saw the lock hanging in the hasp. The switch stand is set on what we call a head block, probably eighteen or twenty inches long. It was a Ramapoo switch, and comes up in the form of a bowl at the top of the stand; the bowl is square. Then we use a plunger that is

worked from a handle up and down to throw the switch, and this plunger is also square. It fits very snugly down on the bowl of this stand. When we push the handle down it fits down in the square bowl, and then we put the handle through a kind of little clasp that has a hole through to hold the lock. To throw the switch you have to unlock this lock and pull this handle up to unlock the switch and throw it to the other part of the square that is in the bowl, before you can put the handle down. You can't put the handle down unless this square plunger, which I should judge is three or four inches each way, until it gets that square into the bowl. To move the switch, you have to raise the handle. When the switchman undertakes to move the switch, he pulls the lever up and reverses the switch and places it in a new position. He first raises it about a foot probably. The next move is that he takes and reverses it, throws it around; then lets it down in another position. The effect of it is to move the rail.

When the switch is thrown to any other position except the main line, this target should be at danger. When the switch is set for the main line, what we call the blade is set straight, and you can't see it for any distance. When it is set for the "Y", then it displays this blade of danger right across the track.

The train was due at 2:30 in the afternoon. Exhibit 1, shown me, is the lock which I saw hanging. These marks here on the ring were freshly made. There were marks on the ring of the lock. They were the same as now appear on the ring of the lock, except that they appeared fresh. I found a spike on the head block or large timber that supports the switch stand—a railroad spike; it was about five or six inches long; square; weighted, I should judge, about one-third of a pound; the edges were sharp.

This switch was the extreme southerly switch in the yards, and there was no occasion for switching over that track as a rule. I will venture to say that there was not a switch made on the south "Y" track once a week, with the exception of turning the passenger trains. The cars taken off for repair were put in from the north and taken out from the north end. The east end engine had no occasion to do any switching whatever in the vicinity of this switch where the train was derailed. There was no other engine that did any switching down there, to my knowledge, with the exception that I know they turned the passenger trains there. The east end engine was No. 434; Gibbons was a helper and Reese was the foreman. The different switchmen that had occasion to open and handle switches were supplied with keys. Also the engineers, and various trainmen, trackmen, switchmen, brakemen, foremen and section foremen.

Maurice Casey testified. Transcript 19-20.

That he was a section foreman in the employ of the M. & St. L. at Marshalltown. In March, 1910, I was in the employ of the Chicago Great Western Railroad Company as section foreman. I was at Oelwein on the day when Mr. Spellman was killed by the overturning of his engine; was at the scene of the accident. On the day of the accident, I had no work in the vicinity of that switch, neither myself nor my crew; we weren't up in the vicinity of the switch, and I had no occasion to lock or unlock it. I didn't unlock it or move the switch at all. I had a track walker who went over the yards every day; he was a member of my gang, and under my orders and supervision. His duty was to go over and inspect the tracks and see that everything was all right, and report if he did not find it so. The track walker went over this track every day. He would go over the main line track, southwest, about three quarters of a mile from the depot; that would be about 300 feet beyond this switch to the yard limit point. On the day of the accident, the track walker who inspected this track was Frank Gerade. He used to leave the tool house about one o'clock and go southwest the first thing after dinner. He got down there probably about 1:30.

Frank Gerade testified. Transcript 20-21.

I formerly lived at Oelwein; worked there for the Chicago Great Western Railroad Company. Mr. Casey was my foreman in March, 1910. I was walking track under his direction. I remember the circumstances of Mr. Spellman, an engineer, being killed in March, 1910. I was at the scene of the wreck; know where it occurred. On the day that Mr. Spellman was killed, I walked the track up there along where this track was. I observed the switch where the wreck occurred; that was before the accident. I walked south past the switch about 350 feet to the yard limits. When I got to the yard limits, I came back on the same line. Both times I walked on the main line. The track was lined up for the main line; lined up right for the main line. I observed the switch stand as I went by; the switch was set for the main line. I walked along there about an hour before the accident occurred.

When I got to the switch stand I stayed there a minute or two. I didn't go over to the switch. I looked at it twice. I noticed the switch points as I went down; was at the switch about half past one; saw the switch was all right. I was giving particular attention to see that the eye, the hasp through which this lock was, was all right. It was worn a little, but not through. It was not the way it is in photograph Exhibit "B" before the accident. It was worn very thin, but not through.

J. Linney testified. Transcript 22.

I was a switchman in the employ of the Chicago Great Western at Oelwein in March, 1910. I was working for the company on the 28th of March, 1910, on the date that Mr. Spellman was killed. At that time the Great Western had four switching crews. I was foreman of one of the switching crews; did my work in what they called the new yard, about a mile and a half from where this accident happened. We always called this switch the south line high switch. For some time I had not been near it. I don't suppose I had thrown this switch a half dozen times in a year previous to this man getting hurt there. Neither I nor any member of my crew was down to that switch that day, or within a few days prior to that time. I was with my crew all day.

There weren't any more crews outside of those four. Gibbons didn't have charge of the engine on that day; he was a helper on the crew. A man named Reese had that crew that day. He was foreman. I was foreman of one of those crews, Mr. Becker of another, Mr. Plashal of the third, and Mr. Reese of the fourth. And of the crew of which Mr. Reese was foreman, Mr. Gibbons was a member.

Mr. C. G. Becker testified. Transcript 22-23-24.

Have lived at Oelwein thirty-eight years. I am a switchman in the employ of the Chicago Great Western. I remember the circumstance of Engineer Spellman being killed by the overturning of his engine. He was coming in from the southwest hauling passenger train No. 4. I was at the scene of the accident some time after it occurred—probably a couple of hours. I know where the accident occurred; near what we call the high "Y" switch on the southwest main line, or line leading to Des Moines. On the day of the accident, I was foreman of a switching gang. I was not a member of the gang that Mr. Linney was foreman of; that was another one. We had four gangs in all in the yards at Oelwein. Mr. Linney was foreman of one, I of another, Mr. Plashal of another and Mr. Reese of the fourth. I know Mr. Gibbons. He was a switchman at that time. He was working with Mr. Reese. On the day of this accident, neither I nor any member of my crew went down to this high switch where the accident occurred, before the accident. On that day I had no occasion to do any switching down there. Prior to this accident, within any reasonable length of time or within a few days, I had no occasion to do any switching down there. It was a place I never used. On the day of the accident neither I nor any member of my crew were down there at all.

John Plashal testified. Transcript 24-25.

I live at Oelwein and my business is switchman for the Chicago Great Western Railroad. I have been a switchman

there for about seven years and a half. In 1910, I had charge as foreman of one of the switching crews. The other foremen were Jack Linney, Chris Becker and Art Reese. I know Gibbons; he was a member of the crew that Reese was foreman of at that time. I remember the circumstance of Mr. Spellman being killed in March, 1910. The wreck occurred at the high switch, south of Oelwein, on the southwest division or the line coming to Des Moines. It occurred about two o'clock or something along there in the afternoon. During the day that the accident occurred, neither I nor any member of my switching crew was down at this high switch where the accident occurred until after the accident. We did no work there; had no occasion to use the switch and didn't use it or move it.

Geo. D. Gibbons testified. Transcript 26-27.

I live at Oelwein and am a switchman for the Great Western Railroad Co. I remember the circumstance of Mr. Spellman's death. That day I was switching in the yards, working on the lower end engine, what we call the lower end. Art Reese was foreman. There were four engines working at this time. Mr. Becker had one, Mr. Plashal another, Linney another and Mr. Reese the fourth. I was a member of Mr. Reese's crew. Our engine had the passenger work to handle. We had to switch all the passenger trains during the day and unload stock and do local work. I know where the switch is where Mr. Spellman's train was derailed. It is off the southwest main line. It is connected with a high "Y" that they use for turning passenger trains. I could not state the exact distance the switch is from the yard limits on the line coming to Des Moines on the southwest division; quite a little ways. It is the last switch; no other beyond that.

Our crew had been over the switch the day before in the afternoon. We were turning passenger train No. 4. We passed over this switch twice, going out and coming back on the main line. That was the last time either I or my crew used that switch prior to the accident. I was at the scene of the accident shortly after it occurred. I did not leave that switch open, nor did any member of our crew leave that switch open. The day Mr. Spellman was killed, I was with the crew all day. On that day neither I nor my crew was over this switch; had not been over it that day.

Mr. A. C. Stevens testified. Transcript 25-26.

I live in Des Moines and am train dispatcher for the Chicago Great Western Railroad. In 1910, I was chief dispatcher for the same company, located at Des Moines. As such chief dispatcher, my duties extended over the line from Oelwein to Kansas City—what is sometimes called the southwestern

division. My duties as such dispatcher were the supervision of all the men in the office—train dispatchers and operators who were handling all trains through the train dispatcher. We ordered these trains from the terminals, and when they reported to leave the terminal the train dispatcher had charge of them; watching the trains to see that they were moving properly. At my office in Des Moines, I would know where every train was running; know within a very few minutes or within one station where all the trains are. A train dispatcher has them in mind because it is necessary to do that in order to keep the line up and to know what his trains are doing. I remember the circumstance of Engineer Spellman being killed at Oelwein on the 28th of March, 1910. He was hauling train No. 4 from Des Moines to Oelwein. The train came from Kansas City; the crew changed at Des Moines. His engine took the train at Des Moines and would haul it as far as Oelwein. It was due at Oelwein at 2:30 in the afternoon. There was one other train on the line between Des Moines and Oelwein besides this train; a train ahead of it. It was a freight train; left here about midnight the night before. No. 4 left here the next morning. The engine of the train that was ahead of No. 4 went in ahead of No. 4 into Oelwein; it was about fifteen or twenty minutes ahead of No. 4. Their engine was out of coal and they were getting onto their sixteen hours which we have to avoid violating—the sixteen hour law—and the train was set out at Hudson, the engine cut off and run in light from Hudson to Oelwein. Hudson is the second station this side of Waterloo; about thirty miles this side of Oelwein. We keep a record, what we call a train sheet; it shows the movement of every train, the number of every train, the conductor's name, the engineer's name, the number of the engine and the number of cars in the train, the time they leave the terminal, and the time they leave every station until they reach the next terminal. It shows dates. The train sheet is supposed to begin at midnight every day. We have a new one for every day. Exhibit #2 is the train sheets for March, 1910, for the district between Des Moines and Oelwein, known as the 4th and 5th district, from Des Moines to Oelwein. The sheets marked Exhibits 2½ and 2¾ in Exhibit No. 2 show the movement of trains at all stations. They show the time of arrival and departure at all stations where there is an operator on duty during the day. Sheet Exhibit No. 2¾ shows the movement of trains on the 27th; Sheet Exhibit 2½ shows the movement of trains on March 28th. The movements of train No. 4 appear on the sheet; it is found in the first column at the right,—Conductor Fagg, Engineer Spellman, Engine 170. It shows that this train left Des Moines at 9:15 in the morning; left Fairbank at 2:18 in the afternoon. Fairbank is the first station west of Oelwein; that is the last station before you

get to Oelwein. It left there at 2:18 which is virtually on time. They were due to leave at 2:15, it was about two minutes late or something like that. The freight train appears on the sheet of March 27, 1910, leaving South Des Moines which is our freight terminal. They left South Des Moines at 11:30 P. M. the night of March 27th. It shows the movements of that train until its arrival at Oelwein; at every station where there was a night operator. The train arrived at Hicks, that is the first station east of Reinbeck, at seven o'clock in the morning. They left there at 9:20. They got into Hudson at 9:30; that is the station I spoke of, where the train was set out. They left Hudson at 12:23, that is the engine did; 12:23 in the afternoon. Tracing the movements of the train until it reached Oelwein; it left Waterloo at 1:07 P. M. that is West Waterloo; De War at 1:27; Dunkerton at 1:36; Fairbank, 1:52; and arrived at Oelwein at 2:15 P. M. on the 28th, that was just fifteen minutes before No. 4 was due. I know these records are correct; they were made under my personal supervision. There was no train into Oelwein between the time when this engine got there at 2:15 and the time of the arrival at 2:30 of No. 4. There was no train out of Oelwein that afternoon between twelve o'clock and 3:30, that is, I mean on this line coming south to Des Moines.

Walter Henry Powell testified. Transcript 28-29.

I live in Des Moines and am a locomotive fireman in the employ of the Chicago Great Western Railroad; have been so employed for seven years and two months. I knew John J. Spellman during his lifetime. I remember the circumstances of his death. It occurred on the 28th day of March, 1910. I was working on an engine between South Des Moines and Oelwein; firing on an engine east from Des Moines to Oelwein. We were hauling a freight train. We left Des Moines just before midnight on the 27th of March and worked east from South Des Moines to Oelwein. We went into Oelwein with a light engine. We had left the train at Hudson, thirty miles this side of Oelwein. We did that because our time was getting too short to get in inside of the sixteen hours. I know where Mr. Spellman was killed, know where the wreck occurred. It was what was known as the "Y" switch, about a quarter of a mile west of the passenger depot, I should judge. It is the first switch you come to going into Oelwein from the south or southwest from Des Moines. We were ahead of No. 4. In going into Oelwein, I was on the left seat box, on the left side of the engine, sitting there looking ahead. This high switch where the accident occurred was set for the main line. We went over the switch all right and noticed nothing particular about it. My recollection of the time we went in there was about fif-

teen minutes ahead of No. 4. We look at all the switches before passing over them. There was nothing about this switch that attracted my attention one way or the other. We came into Oelwein over the southwest division, over the main line, right into the yards, right into the depot. We ran right into the city over the main line and didn't stop at all. We were going about ten miles an hour.

E. H. Fagg testified. Transcript 29-30-31.

I live in Des Moines. I am a passenger conductor on the Chicago Great Western Railroad; in the passenger service about fourteen years. I was the conductor on Train No. 4 that Mr. Spellman was pulling on the 28th of March, at the time of the wreck at Oelwein in which he was killed. I was in the rear car of the train, in the parlor car, as we approached the scene of the accident. When the accident occurred, I got off and went immediately to the engine, saw the conditions there and assisted in getting Mr. Spellman out from under the wreckage. We took him over to a house just opposite the track there, not quite half a block. After that I went back to the scene of the wreck. I made an examination of the switch which was the cause of the derailment, and I noticed that the switch handle was raised up out of the socket on the switch stand and turned part way around. The switch point stood away from the stock rail about half way. That would leave an opening between each switch point and the stock rail on each side. The stock rail is the solid rail that goes up the main line on the left hand side and the "Y" on the right hand side as you are approaching the switch; the part of the track that is not movable. The points are movable. The points were standing away about an inch or so from the stock rail, leaving an opening there where the flange would go between; the wheel would run on the rail up until the track separated far enough to let the wheels drop between the rails. Exhibit No. 3 is a diagram which represents correctly the track in different positions as it was there at the switch stand immediately prior to this wreck. The middle track would represent the switch lined up for the "Y" properly; it would be No. 2. No. 3 would represent the switch as it was when the derailment took place. Track No. 1, the switch point on the right hand here sets up against this stock rail close, and there is an opening here that will line your train up with this main line going up this track here. As the train moves up to the switch, the flanges of the wheels holds the wheels on the track. When the switch is properly lined up for the main line, the way the engine was moving, the flange would follow on the left hand side. At No. 3 you will notice an opening between these points and the stock rail, a small opening in there, perhaps an inch and a half or two inches between each point,

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and the points don't set up against either stock rail, leaving an opening where the wheels would follow down until the track became so wide they would run on these two outside rails, the wheels would, until the gauge became so wide that the wheels would drop down in between the rails. I should judge it would be about twelve or fifteen feet. I have been in the railway service twenty-five years last March. To have the switch points in the position I speak of, the switch would stand at an angle of about forty-five degrees, that is, the target would stand at an angle of about forty-five degrees, I should judge. When the switch is lined up for the main line, the handle is down and locked in a hasp, and there is a square plunger on the stand that when you raise this handle up, this plunger comes out of the cylinder. The plunger sets into a square cylinder—that is, the inside of it is square —and the plunger is a square block. When you raise the handle up, you raise the plunger out of the cylinder. You have to pull it clear around in order to throw it to the side track or "Y", clear around to get the square, in order to put it down in, that plunger, it has to go a quarter of the way around. That is, your handle goes a quarter of the way around. If it is only moved part way around so that the plunger doesn't go down into the socket, the tracks will be open. Basing my answer on my experience as a railroad man, in operating trains, an engine or car could not stay on the track with the switch or tracks in the condition that they were in when I saw them, running over the switch going towards the point of the switch; it would necessarily result in a derailment.

Earl F. Hatfield testified. Transcript 31-32.

I am a locomotive engineer on the Houston & Texas Central, living at Austin, Texas, and was in March, 1910 living in Des Moines, and was on the engine that was derailed going into Oelwein on the 28th day of March on which Mr. Spellman was killed. I was firing the engine. The switch where the accident occurred was known as the west "Y" switch. For some distance southwest of that switch the track is straight; at least one-half mile. Going into Oelwein, on that occasion, I placed in a fire and then climbed on the seat box; was about one quarter of a mile from the switch when I got on the seat box. I was on the left side going east. Mr. Spellman was on his seat box on the right side; as we approached the switch he was looking ahead. When I first got onto the box I glanced across the curve looking for any trains that might obstruct the main line. Shortly after that, I looked along the line of the track. I glanced up the track ahead of us and noticed the switch stand was wrong, or the target was against us. Then I spoke to the engineer that the switch was wrong. He took a good look for himself and

then applied the air. The rail was what I took to be half and half. The switch was lined up for neither one track nor the other. I looked at the target from my side. It was far enough around so that I could see the outline of all of it. When the target at the switch stand is set for the main line and in proper position, the target will point parallel with both rails of the track. And when set for the "Y" it would point straight across the rails. It was not pointing in either direction. I would be unable to state at just what angle it was, but it was far enough around so that I could see all of it.

J. L. Ervin testified. Transcript 32-33.

I live at Oelwein and am special agent of the Chicago Great Western Railroad. I recall the circumstances of Mr. Spellman's death on the 28th day of March, 1910. I was at the scene of the accident a few minutes after it occurred. I examined the switch stand. I noticed the padlock hanging on the switch stand, unlocked. I think there was a spike laid there—a common railway spike. I took charge of the lock and examined it carefully. There were marks where it had been hammered. I noticed those marks at the time I took the lock. They were the same as they are now. They appeared to be fresh marks then. The lock was hanging in the switch stand, unlocked and out of the hasp. The lock can be unlocked without a key. When I got down to the switch stand, Mr. Vermillion and Mr. Fagg, I believe, were there. They were looking over the switch stand and lock to find out what had caused the accident. I made a careful inspection of the hasp or ring through which the ring part of the lock was placed when the switch was locked. The hasp was somewhat worn. I said the lock could be opened in another way; it could be jerked open with a chain; I don't recall seeing the men do that way, but I could do it that way. I have seen it done. I have unlocked that one; did it shortly after the accident. In opening this lock with a chain, I don't think I experimented with any other lock. By putting this ring through something solid the lock can be jerked open, and that I did. The lock on this switch stand, the day this wreck occurred, was in such condition that when placed in the hasp and locked, by pulling on the chain you could unlock it. I cannot tell how long it had been in that condition. Don't know how long is had been there.

The above and foregoing was all the evidence in the case.

VI.

IF IT CAN BE SAID THAT PLAINTIFF'S EVIDENCE RAISED A PRESUMPTION OR JUSTIFIED AN INFERENCE THAT DEFENDANT WAS NEGLIGENT, CAN SUCH PRESUMPTION BE OVERCOME AS A MATTER OF LAW BY THE TESTIMONY INTRODUCED BY DEFENDANT?

After reaching the conclusion that plaintiff's evidence called for the application of the doctrine *res ipsa loquitur*, and that under such doctrine the testimony offered made a *prima facie* case for the plaintiff, the court then holds that such presumption could not be overcome as a matter of law and that any evidence which the defendant might introduce to show freedom from negligence on his part would leave the case for the jury. Quoting the writer of the opinion:

> "Precedents may be found where courts have assumed to hold that an employer's rebuttal in such cases is sufficient, as a matter of law, to overcome plaintiff's *prima facie* case, but it must be a very unusual case to justify such an interference with the functions of a jury. The contrary rule is thoroughly well established."

In view of the large number of well considered cases to which the court's attention had been called holding that such presumption could be overcome as a matter of law, the statement above quoted finds no justification. In support of the conclusions reached, without any reference to the numerous cases holding to the contrary, the writer of the opinion cites and quotes from a few cases in support of the statement that "precedents may be found where courts have assumed to hold that an employer's rebuttal in such cases is sufficient, as a matter of law", but that the contrary rule is well established. These cases fall very far short of thoroughly establishing the rule announced. The case principally relied upon is *Kohner vs. Traction Co.*, 22 App. D. C. 181, 62 L. R. A. 875. That was a case where a passenger on a street car riding with his wife and children was injured by being struck in the face by the right hand of the conductor. The conductor attempted to explain away his conduct by claiming that the blow was accidental. The court held the case was for the jury. There is nothing in this case, as we read it, that supports the conclusion of the opinion under review. The plaintiff was struck by the conductor in the face with his right hand and his nose and right eye lacerated and bruised. The conductor claimed that he didn't mean to do it. Of

course it was for the jury to say on such testimony whether the act was intentional or the result of unavoidable accident.

An examination of the three or four other cases cited in support of what is claimed to be a thoroughly well established rule will show, when carefully read, that they don't support the rule contended for. Turning now to precedents which the writer of the opinion states may be found "where courts have assumed to hold that an employer's rebuttal in such cases is sufficient, as a matter of law, we find them emanating from courts of high standing, well considered and convincing. The first two cases to which we call attention are cases decided by the Iowa Supreme Court. *O'Connor vs. Ry. Co.*, 83 Iowa, was a case in which the plaintiff, an employee of the defendant, brought suit to recover damages for injuries sustained in being thrown from a freight car alleged to have been so defectively constructed that it would not turn a curve. The only evidence that the car complained of by the plaintiff was defective was, that while the same was being moved by pushing the car ahead of an engine over the defendant's track it was derailed on a curve. Defendant introduced evidence to show that the car was carefully inspected the day before the accident and the day after the accident and was found each time to be in perfect order. It was held that the verdict for the plaintiff was not supported by the evidence. In the course of the opinion it is said:

> "Hence, the simple fact of derailment stands as the only evidence of negligence. If that simple fact could, in law, be sufficient to show negligence, it is conclusively overborne by an affirmative showing that the car in the particular as to which it is alleged to be defective was not so, at least, in a manner that it was ascertainable; and there could be no claim that more was required of defendant than diligence to know if the car was serviceable. That the mere happening of the derailment or the accident would not show negligence, see *Baldwin vs. Railway Co.*, 68 Iowa, 37; *Case vs. Railway Co.*, 64 Iowa, 762; *Gandy vs. Railway Co.*, 30 Iowa, 420."

Baker, Admr. vs. C. R. I. & P. Ry. Co., 95 Iowa, 163 is a case in which a sectionhand walking home on the track was run down and killed. It was held that the presumption that the instinct of self-protection makes one diligent is overcome by evidence that an employee off duty, was struck by a train which he had reason to expect and which he could have heard four hundred feet away.

Klitzke vs. Webb, 120 Wis., 254, 97 N. W. 901, was an action brought by plaintiff to recover damages for personal

injuries sustained by the falling upon her of a door which had been taken from its hinges and placed standing against the wall on the platform of defendant's store where plaintiff was standing after having transacted her business in the store, to wait the arrival of her vehicle. It was held first, that such facts were sufficient to establish a *prima facie* case of negligence on the part of the owner of the store under the doctrine of *res ipsa loquitur*. Second that the presumption of negligence arising from the accident was rebutted by uncontradicted evidence that when the door was removed from its hinges and placed on the platform its base was placed against a row of nail heads in the platform, 18 inches distant from and parallel with the building, and that the door was leaned up against the building, with its top just under a gas pipe, which ran along on the outside of the building. From the opinion by Mr. Justice Winslow, we quote the following:

> "In order to show actionable negligence on the part of the defendants, the plaintiff relied solely on the doctrine of *res ipsa loquitur*. She gave evidence to the effect that she was standing on the platform, that cient evidence in the first instance, to raise a presumpshe did not touch the door, and that for some unexplained cause it fell upon her. Doubtless this was sufficient evidence, in the first instance, to raise a presumption that the door was negligently placed upon the platform by the defendant's servants in such a position that it was liable to fall over without assistance because if securely and properly placed, it would not, in the ordinary course of events, fall over without some intervening or assisting cause. This doctrine has been approved many times in this court, and is not open to question. (Citing authorities.) The proof was sufficient, therefore, when the plaintiff rested her case, to take the question of defendants' negligence to the jury. The defendants, however, met this presumption by direct and positive proof that when the door was removed from its hinges on the morning of the accident and placed outside upon the platform its base was placed against a row of nail heads in the platform 18 inches distant from and parallel with the building, and that it was leaned up against the building with its top just under a gas pipe which ran along on the outside of the building. This evidence was specific and uncontradicted. It is a matter of common knowledge that a door of the size and weight of the door in question, when placed in such a position under ordinary conditions, such as were present here, will not fall outwards without assistance. The laws

of gravitation forbid. Hence, when this proof came in and was undisputed, the presumption of negligence from the mere happening of the accident was entirely overthrown, and nothing was left for the consideration of the jury. This principle also has been frequently declared, and is well established."

Cronk vs. C. M. & St. P. Ry. Co., 3 S. Dak. 93, 52 N. W. 420, was an action for negligently causing a fire which destroyed plaintiff's property. It was held first, a *prima facie* case is made by the fact of the fire, because the fact of the fire starts a presumption of negligence; second, that such presumption is rebuttable and where the evidence in rebuttal is clearly and satisfactorily against such presumption, it must be held to be overcome; third, when, in such cases, there is no evidence whatever of actual negligence, a verdict finding negligence is unsupported by evidence, and must be set aside.

Menomonie River Sash & Door Co. vs. Milwaukee & N. R. Co., 91 Wis. 447, 65 N. W. 176 was also an action to recover damages for setting out a fire. It was held that the inference of negligence arising from the fact that the fire was set by sparks from defendant's engine is overcome by undisputed evidence that the engine was properly constructed and equipped, was carefully inspected the day before the fire, and found to be in proper order and was properly managed.

Southern Kas. Ry. Co. vs. Walsh, 45 Kans. 655, 26 Pac. 45, was an action by a passenger to recover for injuries resulting from the derailment of a train on which he was riding. It was held first, "that when plaintiff had shown the occurrence of the accident and the extent of his injuries, a *prima facie* case is made out in his favor, and the burden is thrown upon the railway company to show that the injury did not result from a want of care upon its part. Second, that the *prima facie* case thus made out may be overthrown by showing that the injury resulted from inevitable accident or something against which no human prudence or foresight on the part of the company could provide." In the opinion it is said:

"It is well settled by the authorities that in such cases a *prima facie* presumption of negligence on the part of the railroad company arises, which throws the onus upon the company of disproving a want of care on its part. Proof of the occurrence of the accident, and the extent of the passenger's injury makes a *prima facie* case in his favor; but this may be overthrown by showing that the injury resulted from inevitable accident, or something against which no hu-

man prudence or foresight on the part of the company could provide."

Gibbons vs. Wisconsin Valley R. Co., 62 Wis. 546, 22 N. W. 533 was an action to recover damages for property destroyed by fire set out by sparks from an engine. There were two engines, one or the other of which, it is alleged, started the fire which burned the plaintiff's lumber. Evidence was introduced by the defendant to show that they were properly constructed and equipped and provided with all approved appliances for preventing the escape of fire. Testimony was given by the engineer who operated one of the engines and who was well acquainted with the condition of both of them, and by the master mechanic of the defendant company. The testimony was uncontradicted and there was no other testimony on the subject. The trial court refused to instruct a jury that "the evidence in this action shows that the engines of the defendant company were in good condition, properly constructed, and provided with all the usual appliances for the prevention of the escape of fires, in use at the time the fire occurred," and submitted to the jury the question as to whether such engines were so constructed and in such condition. This was held to be error.

Spaulding vs. C. & N. W. Ry. Co., 33 Wis. 582 was an action to recover damages for the setting out of a fire by defendant's locomotive. It was held first, that the fact that damage was caused by fire escaping from a locomotive engine, creates a presumption that the engine was defective in construction or condition, which throws upon the railroad company the burden of proving the contrary. Second, *that such presumption is, however, merely a presumption of law; and it is for the court,* and not for the jury, to determine the amount and character of the proof necessary to overcome it. Third, that where the evidence of the defendant as to the construction and condition of the engine was uncontroverted and was clear and decided to the point that they were properly constructed and equipped, and provided with all the most modern and approved appliances for preventing the escape of fire, it was error for the court to submit that question to the jury. In the opinion, it is said:

> "The law is, doubtless, that where there is no conflict of testimony, where the existence of a fact is clearly proved by the undisputed testimony, the court should hold that the fact is established, and it is error to leave it to the jury to find whether or not the fact exists. *Story vs. Brennan*, 15 N. Y. 524; *Gale vs. Wells*, 12 Barb., 84; *Small vs. Smith*, 1 Denio, 583; *New York & Erie R. R. Co. vs. Skinner*, 19 Pa. St. 298; *Harris vs. Wilson*, 1 Wend. 511; *Goodman vs. Simonds*,

20 How. (U. S.) 359; *White vs. Stillman*, 25 N. Y. 541; *Michigan Bank vs. Eldred*, 9 Wal. 553.

But the learned counsel for the plaintiff very ingeniously argue, that the presumption that the defendant's locomotives were not properly constructed and equipped (which, it was held on the former appeal, arises in a case where the fires complained of are communicated from them) has the force and effect of testimony in the case; and that the question whether the testimony introduced for the purpose of overcoming such presumption is sufficient for that purpose, is necessarily a question of fact to be determined by the jury. The argument would probably be a sound one, were this a presumption of fact. Its weight and force, and consequently the amount of proof essential to overcome it, would in such case be for the jury and not for the court to determine. But the presumption under consideration is clearly one of law, and is governed by an entirely different rule. Its weight and effect, and the amount and character of the proof necessary to overcome it, are questions for the court, and were determined by this court on the former appeal. In such cases, if there is a conflict of testimony, the jury must determine what facts are proved; but where, as in this case, there is no such conflict, and the testimony is clear and satisfactory against the presumption, it is the duty of the court to hold, as matter of law, that the presumption is overcome."

Chief Justice Dixon said:

"I see no inconsistency between the views expressed in the foregoing opinion and those expressed by myself in *Graves vs. the State*, 12 Wis. 591 and *Welch vs. Sackett, id.* 243, in relation to what is a presumption of law, and what one of fact; and I therefore concur with Mr. Justice Lyon that the presumption in this case is properly denominated a presumption of law. It is a presumption drawn or indulged by the court, as distinguished from one which must be drawn by the jury, which furnishes the practical test whether it is a presumption of law or of fact. This whole subject is most learnedly and elaborately examined in *State vs. Hodge*, 50 N. H. 510 in which a like question arose as in *Graves vs. State* and where the doctrine of the latter case as to the nature of the presumption is distinctly affirmed."

Read vs. Morse, 34 Wis. 315 was an action to recover damages for property destroyed by fire escaping from the

smoke stack of a steam tug owned by defendant. It was held that uncontradicted for defendants showed that their boat was furnished with all appliances for the escape of fire which could reasonably be required. It was error to submit that question to the jury.

The learned writer of the opinion under review takes the position, however, that the presumption of negligence from the application of the *res ipsa loquitur* maxim is a presumption of fact and cites *Lipsky vs. Reis Coal Co.*, 136 Wis. 307, 117 N. W. 803 in support. The impression that the case cited so holds, could only be obtained by a very hurried examination of the case. It would be strange indeed to find a court which had so many times held as we have seen, that the presumption arising from the application of *res ipsa loquitur* doctrine, was one of law and not of fact, to announce that the presumption was one of fact without overruling its prior decisions or to refer to them in any way except to cite them in support of their holding, if it had been intended, as the writer of the opinion assumes to hold, that the presumption was one of fact.

Commenting upon the evidence in the *Lipsky* case, the writer of the opinion says:

> "It is further contended that any inference which might otherwise be drawn from the fall of this timber that it was insecurely fastened, or the defendant guilty of negligence in relation thereto, was excluded by proof of the exercise of due care in inspection of the dock by defendant's foreman the morning before the accident. Upon examination of such evidence, however, which consists of the testimony of the foreman himself and his assistant, we find them to assert an extremely cursory glance about the dock, such that it was by no means certain to inform him as to the existence of looseness or other defect in these timbers, and it was within the jury's competency to consider and decide whether this did constitute such due care as might, under familiar rules, have overcome the inference of negligence. The inference of negligence which in a proper case may be drawn from the accident itself is one of fact, and the authority of the jury to decide whether it should be drawn can be excluded only in presence of undisputed proof, not merely testimony, that such negligence did not occur."

Citing "the cases or some of them in which the court had quite frequently held that the presumption when overcome by undisputed evidence, was one of law and not of fact."

It seems clear, therefore, that the court did not intend to discredit its prior decision holding that the presumption was

one of law, but that all the writer of the opinion intended to say was that under the evidence in the particular case under consideration as to whether the presumption was overcome, was a question of fact, having in mind that the negligence charged was in the fall of insecurely fastened timbers and that the only inspection of the place made was "extremely cursory glances about the dock, such that was by no means certain to inform him as to the existence of looseness or other defect in these timbers" made the question one of fact and not of law. The case cannot be regarded as authority for the claim made in the opinion under review that the presumption was one of fact rather than of law and ought not to have been cited as laying down an unqualified rule of law to that effect.

VII.

MERE SURMISE OR CONJECTURE WILL NOT TAKE THE PLACE OF PROOF.

Where evidence is equally consistent with the absence as with the existence of negligence, no recovery can be had. *Edgar vs. Rio Grande W. R. Co.*, 32 Utah, 330, 90 Pac. 745, 11 L. R. A. (N. S.) 738, is a case in its facts practically identical with the instant case. The Supreme Court of Utah there held that a railroad company cannot be held liable for the death of a fireman because of a misplaced switch unless it is shown that the company was responsible for the switch being open; and it is not sufficient to show that the switch must have been left unlocked by some one to whom the company had intrusted a key. The facts in the case are as follows:

George Edgar, plaintiff's decedent, was a fireman in the employ of defendant railroad company. The action was brought to recover damages for his alleged wrongful death which occurred on the 5th day of July, 1905 at Park City, Utah. The complaint alleges that the deceased, on or prior to July 5th, 1905, was a fireman in the employ of defendant company, and that on said day the engine on which he was riding was derailed by running into an open switch, thereby causing said engine to tip over and fall on its side, causing the death of said deceased, who was caught under the engine as it fell. It is charged that the defendant company negligently and carelessly failed to keep said switch closed, in a proper and safe condition so that cars would not leave the rails when passing over the same, and negligently failed to keep said switch locked, and negligently left said switch unlocked and open, etc. At the conclusion of plaintiff's evidence, the court, on motion of defendant, granted a nonsuit. The train on which George Edgar was employed was a regu-

lar passenger train running between Salt Lake City and Park City daily. The train left Salt Lake City each morning, and arrived at Park City at 10:50 o'clock in the forenoon, and departed daily on its return trip to Salt Lake City at 3:20 o'clock in the afternoon. This was the schedule run on the day of the accident. The train, before starting on its return trip to Salt Lake City was run back and forth over the switch in question three times, the last time being about 11 o'clock in the forenoon. Each time when the train passed, the switch and rails were in proper condition and were set and aligned for the safe passage of trains over the main line. After passing over the switch for the last time, the train was backed southward to the defendant's depot building, and there stopped, with the engine facing towards the north, ready to start for Salt Lake City at the usual time. The switch in question was about 1,000 feet distant in a northerly direction. When the train pulled out, and had reached a point about 150 feet from the switch, the engineer for the first time noticed there was a break in the rails at that point, and he shouted to the deceased, "Jump, George! the switch is wrong," and at the same time set the brake, reversed the engine, and opened its throttle. The deceased, when thus warned of the danger, leaped from the engine, but the train could not be stopped and as a result the engine ran into the open switch, and turned over on its side, crushing George Edgar under it. In the opinion by Chief Justice McCarty, it is said:

> "The allegation in the complaint that the defendant left the switch open remains wholly unproved. It was not sufficient for appellants to show that defendant company may have been guilty of this particular act of negligence. It was incumbent upon appellants to produce some substantial evidence which would at least tend to fasten the blame on defendant for the misplaced switch which caused the accident. Where, as in this case, the evidence leaves the matter uncertain as to whether the defendant or some unknown party is responsible for the act of negligence alleged, a recovery cannot be had.
>
> In the case of *Patton vs. Texas & P. R. Co.*, 179 U. S. 658, 21 S. C. Rep. 275, Justice Brewer, speaking for the court, says:
>
> 'It is not sufficient for the employee to show that the employer may have been guilty of negligence. The evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not,

it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. 2 Labatt, Mast. & S. 837; *Fritz vs. Salt Lake & O. Gas & Electric Light Co.*, 18 Utah, 493, 56 Pac. 90; *Sorenson vs. Menasha Paper & Pulp Co.*, 56 Wis. 338, 14 N. W. 446; *Descrant vs. Cerrillos Coal R. Co.*, 9 N. M. 495, 55 Pac. 290; *Shaw vs. New Year Gold Mines Co.*, 31 Mont., 138, 77 Pac. 515; *Dobbins vs. Brown*, 119 N. Y. 188, 23 N. E. 537.'

The important question, therefore, is: Was the leaving of the switch unlocked the proximate cause of the derailment of the engine in question? We think this question must be answered in the negative. The evidence, we think, conclusively shows that the unlocked condition of the switch was not the proximate cause of the death of the deceased, nor did it in any manner contribute thereto. The record shows that, before the continuity of the rails on the main line was broken by the misplacement of the switch between 11 o'clock A. M. and 3:20 o'clock P. M. on the day in question, the main track where it passed the switch was "absolutely safe, even if the lock were unlocked, so far as the trains passing over it was concerned;" that "no train running over the rails could throw it out;" and that it would require an exertion equivalent to from "50 to 75 pounds" to throw open the switch and thereby break the continuity of the rails on the main line. Under these conditions, it is evident that the unlocking of the switch and leaving it in that condition could not in any degree have rendered the track dangerous or unsafe for the passage of trains."

In the opinion in the *Edgar* case it is said:

"While it may be fairly inferred from the evidence that some person in the employ of the respondent, or some party to whom it had intrusted one of its keys to the switch, left the switch unlocked, yet there is a total want of evidence to support a finding that the switch was left open either by respondent or by any person who, with respondent's consent, used the switch or carried one of the keys thereto."

The court here makes it clear that if it be inferred that someone in the employ of the company to whom it had intrusted one of the keys to the switch, left the switch unlocked "yet there is a total want of evidence to support a finding that the switch was left open either by respondent or

by any person who, with respondent's consent, used the switch or carried one of the keys thereto."

The instant case is much weaker in this respect than is the *Edgar* case. *Here there is no charge in the petition that the company was negligent in leaving the switch unlocked.* In this case the evidence shows that "when the lever is placed in such a position as to be low enough that the eye goes through the lever, between the sides of the lever, and the lock is then inserted in the eye, either locked or unlocked, the tracks could not be moved before the lock was taken out of the eye and the lever raised." (Transcript page 7, lines 24 to 28 inclusive.)

The foregoing is from the testimony of James Sheriff, plaintiff's principal witness. From his testimony we further quote:

> "While I was working there, I know who were supplied with keys for these switches. I had them thrown to me several times. The trainmen, switchmen, section men and I also might say the hostlers that take the engines out on the road and try them, running from the back shops, were supplied with keys." (Transcript page 9, lines 14 to 30.)

Mr. Vermillion testified:

> "Exhibit No. 1 (the padlock in question) is our standard lock. I should say the same key would unlock all the switch locks; a standard lock and standard keys." (Transcript, page 19, lines 9 and 10.)

J. L. Ervin testified:

> "I was at the scene of the accident a few minutes after it occurred. I noticed the padlock hanging on the switch stand unlocked. I think there was a spike laid there—a common railway spike. Exhibit No. 1 is the lock that I took from the switch stand. There are the marks where it has been hammered. I noticed those marks at the time I took the lock. The marks were the same as they are now, but, of course, they might be older, show age more. They appeared fresh marks then. The lock was hanging in the switch stand unlocked, and out of the hasp. The ring of the lock hung down; it was hanging loose, that is fastened by the end of the chain to the switch stand. The lock can be unlocked without a key." (Transcript of record page 32, lines at bottom of page.)
>
> "This lock on this switch stand the day this wreck occurred was in such condition that when placed in

the hasp and locked, by pulling on the chain you could unlock it. Cannot tell how long it had been in that condition. Don't know how long it had been there." (Transcript page 33, lines 19 to 23.)

One hour before the accident the switch had been examined by Frank Gerade, a trackwalker for the company. He walked past the switch to the end of the yard limits and back again, both times walking on the main line. The track was lined up for the main line, lined up right for the main line. He observed the switch stand as he went by and the switch was all right, in the place it belonged. (Transcript, page 21, lines 6 to 10.)

He testified:

"When I got to the switch stand, I stayed there a minute or two. (Transcript, page 21, lines 24 and 25.) * * * I saw the switch was all right. I was giving particular attention to see that the eye, the hasp through which this lock was, was all right. It was worn a little, but not through. It was not the way it is in photograph, Exhibit "B" before the accident. It was worn very thin but not through." (Transcript, page 21, lines 33-36.)

The switch was last used for the purpose of turning this same train No. 4 the day previous. It was the last time prior to the accident the switch was used. At the time of the accident there were four switching crews in the employ of the company at Oelwein. Linney was foreman of one of the crews, Mr. Becker of another, Mr. Plashal, of the third and Mr. Reese of the fourth. Mr. Gibbons was a member of Mr. Reese's crew. (Transcript, page 22.) Mr. Gibbons testified that he was a member of Mr. Reese's crew. That their engine had the passenger work to handle. That they had to switch all the passenger trains during the day. That he knew where the switch was where Mr. Spellman's train was derailed. The last time he or any member of his crew were over the switch was the day before the accident in the afternoon. They were turning the passenger train from the southwest, this same passenger train, No. 4. They would come over the "Y" to this particular switch, shove over the switch and then come back up the southwest main line with the train. In making this movement they would pass over the switch twice, going out and coming back. That was the last time either he or any member of his crew used the switch prior to the accident. He did not leave the switch open nor did any member of his crew leave the switch open. (Transcript, page 27.)

A considerable number of trains had passed over the switch where the accident occurred after the time it was last used to turn passenger train No. 4 the day before the accident. (Transcript page 18.) Fifteen minutes before the accident occurred an engine and caboose, running ahead of No. 4, passed over the switch into Oelwein. Powell, the fireman of the engine, testified that he was sitting on the engine box on the left hand side looking ahead. The switch was set for the main line. When they went over it the switch was all right. They were running about ten miles an hour. (Transcript, page 28.)

The principle that mere surmise or conjecture will not take the place of proof and that where the evidence in an action for negligence is equally consistent with the absence as with the existence of negligence, no recovery can be had, is elementary. The courts have had frequent occasion to announce and apply the principle. Some of these cases will be found cited in the brief of argument under this point. The *Edgar* case *supra*, decided by the Supreme Court of Utah on June 5th, 1907 is in its salient facts so similar to the instant case that we have felt justified in calling the court's special attention to it. We have, in this division of the argument, presented the salient facts of the instant case for the purpose of comparison with the *Edgar* case. If the *Edgar* case was rightly decided, it seems clear for the reasons heretofore given, that this case must be reversed because of the insufficiency of the evidence to justify a recovery. When the sufficiency of the evidence in this case to sustain the verdict is tested by the application of the principle announced and applied by the Supreme Court of Utah in the *Edgar* case, it seems clear that the defendant in error is not entitled to recovery.

The further point decided in the *Edgar* case that leaving the switch unlocked was not the proximate cause of the accident, is also applicable to this case and decisive of it. We have heretofore called attention to the fact that in this case there is no charge of negligence in leaving the switch unlocked. Beyond this, the undisputed evidence here shows that an hour before the accident and long after the switch had been used by the defendant or any one for whose act it was responsible, the handle of the switch was down in proper position to line the track up for the main line, with the ring of the lock through the hasp. The writer of the opinion under review takes the position that the evidence does not show that the lock was locked except by inference and reasons that the lock may have been unlocked. It appears, however, from the evidence of defendant in error's principal witness, to which attention has been called, that with the lock in the position it was shown to be in by plaintiff in error's trackwalker an hour before the accident, the

switch could not be moved, whether the lock was locked or unlocked. If it be the law of this case that before defendant in error can recover, it was incumbent upon him to adduce evidence not simply showing that plaintiff in error may have been guilty of negligence but that there must be evidence of such a character as to point to the fact that it was, there can be no recovery.

VIII.

SUPREME COURT OF IOWA'S ERRONEOUS CONCLUSIONS AS TO THE CHARACTER OF PLAINTIFF IN ERROR'S EVIDENCE.

After holding that the plaintiff's testimony raised a presumption of negligence and that such presumption was one of fact, and could not as a matter of law be overcome, the writer of the opinion then proceeds as follows:

> "But, even if we were to hold that the showing in rebuttal of the inference of negligence may be made so clear and strong that the court will say, as a matter of law, that plaintiff's *prima facie* case has been overcome, we should still be compelled to say that the defense in this case is not of that conclusive character."

The inconclusive character of defendant's evidence as viewed by the learned writer of the opinion is based first upon his construction of the testimony of the trackwalker, who had examined the switch an hour before the accident. It is said:

> "A trackwalker was employed under this foreman's supervision whose duty it was to go over the track, inspect its condition, and make report thereon, and on this day the trackwalker was on duty. The trackwalker being then examined as a witness, said he walked the track that day and passed the switch about an hour before the accident, and observed it as he passed, and that it was lined up right for the main line. He does not say that he stopped in his walk for that purpose, but appears to have satisfied himself by a glance as he walked south between the rails and back again on the north side of the track."

If Your Honors will turn to the blue print, Exhibit 3, Trans. page 40, you will have several diagrams of the track at the switch. No. 1 shows the position of the switch points when the switch is lined up for the main line. No. 2 shows

the position of the switch points when lined up for the "Y" track. No. 3 shows the switch points as they would be when the switch is partially opened. Photograph Exhibit "A", Trans. page 34, will show the position of the track at the switch as one would approach it going toward the depot at Oelwein. Photograph No. B, Trans., page 36, gives the same view with the camera setting nearer to the switch. Photograph No. C, Trans., page 38, shows the switch with the ring of the lock through the hasp. The lock however, as shown in the photograph was turned up or back so as to show the worn condition of the hasp instead of hanging down in its natural position.

Such being the physical features which the trackwalker was inspecting, it would seem that even if his testimony was correctly quoted, nothing more than a glance, as he walked along the track and passed the switch going to the yard limits, would have been necessary to advise him of the fact that the switch was lined up right for the main track. The knowledge thus obtained would be confirmed by walking back past the switch on the north side of the track. We say again that even if the witness' testimony was correctly quoted we see no occasion to discredit it or to question his conclusions, even if he had not stopped to make a closer inspection. But we regret to be compelled to say that the witness' testimony is not correctly quoted. He testified:

> "In walking tracks I walked a track that comes down toward Des Moines on the southwest division. When I walked that track I would go out as far as the yard limits. I remember the circumstances of Mr. Spellman, an engineer, being killed there in March, 1910. I was at the scene of the wreck. I know where the wreck occurred. On the day that Mr. Spellman was killed, I walked the track up there along where that track was. I observed the switch where the wreck occurred; that was before the accident. I walked south past the switch about 350 feet to the yard limits. When I got to the yard limits, I came back on the same line. Both times I walked on the main line. The track was lined up for the main line; lined up right for the main line. I observed the switch stand as I went by; the switch was all right, in the place it belonged. The switch was set for the main line. I walked along there about an hour before the accident occurred." Trans., page 21. * * * "*When I got to the switch stand I stayed there a minute or two.*" Transcript 21, line 24.

The other feature of defendant's evidence which, to the mind of the writer of the opinion, established its inconclu-

sive character, is used to overcome the effect of evidence that 15 minutes before the accident occurred, a train preceding the train which was derailed going in the same direction, had passed over the main line going into Oelwein. Speaking of this feature of the evidence, it is said:

> "In this connection we may notice the circumstance very largely relied upon by defendant that the train which was wrecked had been preceded by a lone engine which passed the switch in safety. The fact affords a legitimate argument in support of defendant's contention that the switch must have been opened within the last quarter of an hour preceding the approach of the train. But such inference does not appear to us by any means conclusive. Referring to the description of the switch stand, it is manifest that, if the plunger were lifted from the socket, a very slight movement of the lever would leave it resting on the top with no effective restraint to hold the switch points in place. Now if there was no hard and fast rule requiring the switch to be locked (and this is a fair inference), it was easily possible for the last employee of the defendant using the switch and having finished the work to hastily swing back the lever as he supposed into place for the plunger to work, then drop the lever, and hasten away after his car without attempting to lock it, believing in good faith that the switch was safely closed, when, in fact, the plunger, missing the socket, rested on top of the stand, leaving the movable rails without any effective restraint to hold them in place. The closer the plunger to the socket, the closer the switch points would be to the fixed rail, the less apparent the danger, but the more likely that a passing engine might pass over the switch without derailment. If left in this condition, it would seem to a reader of the record by no means impossible that the lone engine might have passed the switch in safety, and yet by its movement or by the jar or vibration resulting therefrom caused the unfastened switch points to move further away from the rail and render the passage of the later train much more perilous."

The evidence shows without conflict that the last time the switch had been used was on the day before the accident in turning this train No. 4 which was derailed.

Switchman Gibbons testified:

> "Our engine had the passenger work to handle. We had to switch all the passenger trains during the day and unload stock and do local work. I know where

the switch is where Mr. Spellman's train was derailed. It is off the southwest main line. It is connected with a high "Y" that they use for turning passenger trains on, and is connected with what we call the ice house track.

Q. When before Mr. Spellman's death or the accident that resulted in his death, were you or any member of your crew over that switch?

A. We had been over the day before in the afternoon.

Q. What were you doing?

A. Turning the passenger train from the southwest.

Q. Turning this same passenger train, No. 4?

A. Yes, sir."

Trans., page 27.

In addition to train No. 4 and the engine and tender that passed over the switch 15 minutes before the accident there were a number of other trains that passed over the switch between the time it was last used to turn train No. 4 and the happening of the accident. Superintendent Vermillion testified:

> "The other regularly scheduled trains from the south over this switch where the train was derailed on the day the derailment took place, were: the local due in there at five something P. M.; No. 60, the fast meat train from the southern division, due about three o'clock; No. 2, due there at that time, I think, about 1:45 P. M.—that is our fast train from Kansas City to Oelwein, passenger train; there was another freight train, No. 62, I think that came along about three or four o'clock in the morning." Trans. page 18.

It seems incredible that these facts could have been in the mind of the writer of the opinion when he was assuming the probability that the crew that last used the switch twenty-four hours before the accident had left the plunger resting on the top of the switch in such a way as to have caused it to have gradually opened up. He was evidently only taking into account the fact that the engine and caboose, erroneously spoken of as a "lone engine" was the only train that had been over the track since the switch was last used 24 hours before. We submit, however, that the weakness of the argument is apparent when the mechanical construction of the switch is taken into account. From the testimony of Superintendent we again quote:

"This was a Ramapoo switch, and it comes up in the form of a bowl at the top of the stand, and the bowl is square. Then we use a plunger that is worked from a handle up and down to take and throw the switch, and this plunger is also square. It fits very snugly down on the bowl of this stand. When we push the handle down it fits down in the square bowl, and then we take and put the handle through a kind of little clasp that has a hole through to hold the lock. To throw the switch you have to unlock this lock and pull this handle up to unlock the switch and throw it to the other part of the square that is in the bowl, before you can put the handle down. You can't put the handle down unless this square plunger which I should judge is three or four inches each way, each square is three or four inches, and you can't take and put that plunger down until it gets that square into the bowl. To move the switch, you have to raise the handle. When the switchman undertakes to move the switch, he pulls the lever up and reverses the switch and places it in a new position. He first raises it about a foot probably. The next move is that he takes and reverses it, throws it around; then lets it down in another position. The effect of it is to move the rail." Trans., page 16.

As we understand it, the only way the switch could be moved was after taking the ring of the lock out of the hasp to raise the handle about a foot, thus bringing it from a perpendicular to a horizontal position. This could only be done by the exertion of some strength. Having raised the handle to a horizontal position, to move the switch points so as to line the rail up from the "Y" to the main line or from the main line to the "Y" as the case may be, it would be necessary to push the handle around one quarter of the circle or 90 degrees, whereupon the plunger would drop back into the socket. The handle would change from a horizontal to a perpendicular position and the slot in the handle would fit over the hasp through which the ring of the lock would be placed before locking. It is apparent that the theory of the writer of the opinion as to what might have happened to cause the switch to open mechanically, leaves out of consideration not only the testimony as to the character of the switch, but also the testimony of the witness as to the position of the switch at the time the engine and caboose passed over it. Mr. Powell testified:

"I knew John J. Spellman during his life time. I remember the circumstance of his death. I remember about when it was. It occurred on the 28th day

of March, 1910. I was working on an engine between South Des Moines and Oelwein; firing on an engine going east from Des Moines to Oelwein. We were hauling a freight train. We left Des Moines just before midnight on the 27th of March, and worked east from South Des Moines to Oelwein. We went into Oelwein with a light engine. We had left the train at Hudson, thirty miles this side of Oelwein. We did that because our time was getting too short to get in inside of the sixteen hours. I know where Mr. Spellman was killed—where the wreck occurred. It was what was known as the "Y" switch, about a quarter of a mile west of the passenger depot, I should judge. It is the first switch you come to going into Oelwein from the south or southwest from Des Moines. We were ahead of No. 4. In going into Oelwein, I was on the left seat box, on the left side of the engine on the seat box. I was sitting up there looking ahead. As we were going into Oelwein, this high switch where the accident occurred was set for the main line. We went over the switch all right and noticed nothing peculiar about it. My recollection of the time we went in there was about fifteen minutes ahead of No. 4."

(Transcript 28.)

If, as the writer of the opinion assumes, the plunger was setting up on the top of the switch block with the handle of the switch standing out at right angles as it necessarily would be, and the switch points lined up for neither the main line nor the "Y", the fact would have been observed by Powell. Yet he testified that as they were going into Oelwein he was looking ahead along the track and that the switch was set for the main line, that it was all right, nothing peculiar about it, and that they passed over it at ten miles an hour, without anything occurring to attract attention.

It also leaves out of consideration the testimony of the trackwalker that he was giving particular attention to see that the eye or hasp through which the lock was, was all right. That it was worn a little but not through. That it was not the way it is in Photograph Exhibit "B" before the accident. It was worn thin but not through. (Transcript 21.) The eye to which the witness refers through which he says the lock was, is clearly shown in Exhibit "C". (Transcript 38.) Speaking of the testimony, the writer of the opinion says:

"The track walker, who was the only one testifying who had opportunity to inspect the switch, says that when he passed it it was lined up all right for the main line. This may have been true, and the switch have

been locked. The most favorable construction which can be put upon his testimony with reference to the lock is that as he passed he saw the lock with its ring hanging in the eye; but that is the very position in which it was found after the wreck, when the switch was admittedly unlocked and misplaced."

The position of the lock as testified to by the trackwalker, is not "the very position in which it was found after the wreck." Sheriff testified:

> "The lever as shown in the photograph, Exhibit "C" shows it to be down and locked. When I saw it immediately after the wreck it was nearly one-half way up. The lever in that position would be above the eye of the lock. The lever is taken and raised up, unlocked and raised up. And at the top of the switch is a square and it is about three or four inches deep. You have to raise your lever up high enough in order to get this out of the square before you can turn it around to throw the track. There is a lock with an eccentric at the bottom that throws them from one rail to the other. When the lever is placed in such a position as to be low enough that the eye goes through the lever, between the sides of the lever, and the lock is then inserted in the eye, either locked or unlocked, the tracks could not be moved before the lock was taken out of the eye and the lever raised." (Transcript 7.)

Young testified:

> "The photograph, Exhibit "C" is a correct photograph of a portion of the switch stand as I saw it. The lever that I refer to is shown in the photograph. When I first examined the lever, there was a padlock on the stand. It was in the little hole there, only the lock was hanging down in the eye. The lever was not in the position then that it is shown in the photograph."

The trouble with the statement in the opinion, "That is the very position in which it was found after the wreck", referring to the lock, is that after the wreck the handle was raised to nearly a horizontal position so that while the lock was hanging in the eye referred to, the handle was not over the eye and held in place by the lock as it was at the time it was examined by the trackwalker.

We submit that the reasoning of the writer of the opinion by which he attempts to discredit the evidence of the trackwalker and the fact that a train passed in safety over this switch fifteen minutes before the accident, is without merit.

Respectfully submitted,
GEO. H. CARR,
Attorney for Plaintiff in Error.

FRED P. CARR,
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O. M. BROCKETT,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 901

CHICAGO GREAT WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

L. W. BASHAM, ADMINISTRATOR OF THE ESTATE OF JOHN J. SPELLMAN, DECEASED, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

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STATEMENT.

The plaintiff in error in the opening paragraph of its statement, does not fairly or correctly state the issues set forth in the pleadings. The allegations of the original petition stated that the railroad, plaintiff in error, was engaged in operating a railway throughout the states of Iowa, Illinois, Minnesota, Missouri and Kansas. That John J. Spellman, the engineer that was injured and killed, was an employee of the railroad company as an engineer, and at the time of the injury, which caused his death, was engaged in running and drawing an interstate passenger train.

From these averments it appeared on the face of the petition that the decedent, John J. Spellman, at the time of his injury, was engaged in interstate commerce, and that the right of recovery, if any, was under the Federal Employers' Liability Act. Transcript, 1 and 2.

Counsel for the railroad company filed a demurrer to the original petition wherein they *claimed that the plaintiff in the trial court was not entitled to the relief demanded, nor to any relief whatever, for the following reasons:*

1. *Because it appeared from the allegations of the petition that John J. Spellman "Was at the time he was injured engaged in an act of interstate commerce and that the right of action upon the allegations of the petition accrued to the said Spellman under the Act of Congress approved April 22, 1908".*

2. That it appeared from the allegations of the petition, *that said Spellman lived for a day after said injuries were received and that the right of action and the only right of action on account of injuries to Spellman, as set forth in the petition, accrued to Spellman during his lifetime, and under the said Act of Congress the right of action did not survive to his personal representative, who brought the action.*

3. That the Act of Congress, as it existed at the time of the injury and death of Spellman, *did not provide that a right of action on account of the death of Spellman accrued to the plaintiff in the court below as his personal representative, for the reason that the death of Spellman was not instantaneous.*

4. That the right of action, which, under the allegations of the petition, *accrued to Spellman during his lifetime, not having survived his death and no right of action having accrued to his personal representative because of the fact that the death of Spellman was not instantaneous, the facts stated in the petition did not state a cause of action.*

This demurrer was overruled and thereafter the railroad company answered, denying generally each and every allegation in the petition, and further stating that the injury and death of plaintiff's decedent was due to contributory negli-

gence in failing to observe the open switch and to stop his engine in time to avoid the sidetracking and derailing of the engine.

Transcript, 3.

Thereafter and more than two years after the injury and death of Spellman, an amendment to the petition was filed, stating that John J. Spellman left surviving him a widow, Fannie L. Spellman, who, at the time of Spellman's death, was dependent upon him and to whom Spellman, previous to his death, gave and contributed the wages which he earned as an engineer on defendant's railroad, which wages were $175.00 per month, all of which he gave to his wife and who was his surviving widow, and the amendment further stated that the action was brought for the benefit of Fannie L. Spellman, the surviving widow.

Counsel for the railroad company filed a motion to strike this amendment because it was filed without leave of court, that it set up a new and independent cause of action after the issues had been made up and the case assigned for trial, and because "the cause of action pleaded in the petition as amended is barred by the statute of limitations." This motion to strike the amended petition was overruled.

Transcript, 4.

Thereafter, the railroad company filed an amended and substituted answer to the petition as amended, denying generally the allegations and setting up by way of mitigation the plea that the engineer was guilty of contributory negligence, and further that Spellman having died on the 29th day of March, 1910, and "that the cause of action, upon which plaintiff now seeks to recover, was not alleged nor set up until the filing of the amendment to plaintiff's petition on October 13, 1913, and more than two years after the cause of action arose." That the cause of action set up by plaintiff's petition was barred by the statute of limitations.

At the close of the evidence on the trial of the cause, in the trial court, the plaintiff was permitted to amend his petition to conform the pleadings to the proof, and to state "That Fannie L. Spellman, the surviving widow of the said John J. Spellman, has suffered and sustained great damages, to wit: the sum of twenty thousand dollars on account of the death of John J. Spellman. The plaintiff further states that he withdraws from his original petition the following words, to wit: 'Plaintiff further states that on account of the death of the said John J. Spellman, deceased, his estate has suffered and sustained great damages, to wit, the sum of $20,000.00', the said words being merely a statement of an erroneous legal conclusion."

Transcript, 5.

The last ground of defendant's motion for a directed verdict was, *"The cause of action set up in plaintiff's petition did not survive the death of the said John J. Spellman."*

Transcript, 42.

In the motion for a new trial defendant averred as the tenth ground thereof that *the trial court erred in overruling defendant's motion to direct a verdict.*

Transcript, 55.

The opening paragraph of the statement of plaintiff in error that this cause *was brought under the state law,* and thereafter *was changed to an action under the federal law, is erroneous.*

The action was brought to recover damages for the wrongful death of John J. Spellman, and the averments of the original petition show that Spellman was engaged in interstate commerce at the time of his injury, and from the statements in the petition originally filed, the liability, if any, was to be determined by the Federal Employers' Liability Act.

The Supreme Court of Iowa, in its original opinion filed November 26, 1915, held,—

First, That the allegations of the original form of the petition alleged facts *indicating that the deceased met his death while engaged in interstate commerce.*

Second, That counsel for the railroad company must have held this view when they demurred to the petition on that ground.

Third, That precedents permitting amendments to the petition in actions of this general nature more than two years after the occurrence of the injury, sufficiently supported the ruling of the trial court.

Transcript of Record, bottom page 90, top page 91.

In its supplemental opinion, filed April 7, 1916, the Supreme Court of Iowa, stated that the third paragraph of the original opinion of the Supreme Court was withdrawn and in this supplemental opinion the Supreme Court of Iowa, found,

First, That the original petition filed April 11, 1911, described the defendant company as operating a line of railroad through the states of Iowa, Illinois, Minnesota, Kansas and Minnesota, and that deceased was injured while in charge of an engine hauling a regular passenger train between Des Moines and Oelwein, Iowa, and demanded a recovery of damages.

Second. That the railroad company demurred to the petition on the ground that its averments showed deceased to have been engaged in interstate commerce, and that no right of action survived the death of the intestate.

Third, That the demurrer being overruled the defendant answered in denial and pleaded contributory negligence on the part of the deceased.

Fourth, That more than two years after Spellman's death the petition was amended by adding an allegation that the deceased left a dependent wife who suffered pecuniary injury by his death, and that the action was being prosecuted for her death. That thereupon the defendant in a motion to strike raised the objection that the amended petition stated an entirely new cause of action and was barred.

Fifth, That the motion being overruled, the defendant answered denying the amended petition and pleading the statute of limitations.

Sixth, "We are of the opinion that the statute of limitations affords no defense in this case."

Seventh, That "NOW ASSUMING that plaintiff seeks to recover under the statute of the state and alleges a good cause of action, but before the case is brought to a trial, or even pending the trial, it develops that the plaintiff was injured while in interstate commerce, and that, to sustain a verdict in favor of the administrator, the petition should allege that he was survived by a dependent wife or family, an amendment to the petition adding such necessary averments does not, in the judgment of the court, state a new cause of action permitting defendant to successfully interpose a plea of the statute of limitations".

Transcript of Record, pages 92 and 93.

The Supreme Court of Iowa *did not hold that the cause of action as originally stated in the petition was brought under the state law, nor did it hold that there was a change from law to law by filing the amendment to the petition. It merely held that assuming, but not holding, that plaintiff sought to recover under the statute of the state and alleged a good cause of action, but before the case was brought to trial, or even pending, it developed that the deceased was injured while engaged in interstate commerce and that to sustain a verdict in favor of the administrator the petition should allege that he was survived by a dependent wife or family, the amendment to the petition adding such necessary averment did not state a new cause of action.*

This appeal, so far as the statute of limitations is concerned, is taken *from the assumption of the Supreme Court of Iowa, and not from any finding of the Supreme Court of Iowa, that there was any change from law to law by the filing of the amendment to the petition.*

Immediately after the derailment of the engine and the injury to Spellman, the switch was examined and the lever of the switch was found raised, so that the switch could be turned either way, and the lock was unlocked and hanging in

the eye of the hasp, showing that some person had unlocked the lock, raised the lever and hung the lock in the eye of the hasp.

The switch stand, with the lever down and lock locked, is shown by a photograph marked Exhibit "C" on page 39 of the Transcript of Record. This switch was generally kept locked. Trainmen had keys to this lock.

The statement of the plaintiff in error that "one hour before the accident the switch was inspected by the track walker and found to be closed and locked for the main line," is based on the testimony of one Gerade, a track walker that he was at the switch and inspected it about ten or fifteen minutes after one o'clock in the afternoon of the day of the accident, he testifying that he walked down the main line, passed this switch and then stepped on the outside north of the rail and walked back up the track, but he did not go over to the switch. While no witness testified to the contrary, the cross-examination of this witness as disclosed by the record, shows his inspection was perfunctory.

Gerade was the only inspector in defendant's yards at Oelwein. (Transcript, 20.)

There were 42 miles of switch track in this yard. (Trans., 14.)

Gerade had to examine all the tracks in this yard, look at all the rails, ties, spikes in the rails and all the straps on either side of the rails where they were joined, and all the bolts in those straps, and look at all the 200 switches. In doing this inspection he had to walk slowly. He went on duty at seven o'clock in the morning, took one hour off at noon, and quit at one o'clock P. M.

Transcript, 20, 67, 68 and 69.

The statement that "fifteen minutes before the accident an extra freight consisting of engine and tender came into Oelwein from the southwest ahead of No. 4, passed over this switch on the main line; that at that time the switch was closed and set for the main line and the engine passed over the switch safely", is a conclusion on the testimony of a locomotive fireman in the employ of the railroad, who testified that he was employed as fireman by the railroad company, that he went into Oelwein with a light engine ahead of the Spellman train, that he was sitting on the seat box on the left hand side of the engine, looking ahead, and that this switch where the accident occurred was set for the main line; that he went over the switch all right and *noticed nothing particular about it;* that his recollection of the time he went over the switch was about fifteen minutes ahead of Spellman's train; that he went in with the engine because he had left the train at Hudson, thirty miles south of Oelwein, because his time was getting too short to get inside of the sixteen hours.

On cross examination he testified he went on duty at 11:15 at Des Moines and at 4:15 of the afternoon of the following day the sixteen hours would be up. That he did not know the exact time that he arrived at Hudson, but that it was around noon or a little after. That when he went by this switch he was sitting on the seat box at the left side of the engine. He further testified as follows, on cross examination:

Q. *You don't recollect looking at this particular switch as you passed by it, do you?*

A. *Well, yes. Well, I just don't remember the incident, but I know we looked at all switches before we passed over them.*

Q. *I understand. There was nothing about this switch that attracted your attention one way or the other, and nothing about the other switches, of course you think you looked at all of the siwtches?*

A. *Yes, sir.*

Q. *But you haven't any recollection of looking at any particular one, have you?*

A. *No.* (Transcript, 73.)

The statement that during the entire day of the accident the switch in question had not been used by employees of the company and there had been no switching of trains, engines of cars in that part of the yards, is a conclusion merely, based upon the testimony of some of the members of the *day switching crews* in the yards at Oelwein, who went on duty at *seven* o'clock in the morning, who testified that they did not switch any cars over this switch on the day of and before the accident, *but there was a night crew that switched out cars from any part of the yards, that needed to be taken to the shops,* and *these cars were switched by the night crew over this switch and taken to the shops over the main line track.* (See Transcript of Record, pages 17, 18, 71 and 72.)

This night crew went on duty at seven o'clock in the evening and off at *seven o'clock in the morning.* There was a sidetrack within a few feet of the main line extending both north and south from this switch on which "bad order" cars were stored, and if there were cars on this sidetrack to be taken to the shop for repairs, they were taken over this main line track and through this switch. Moreover, the night crew *turned coaches at night. There was a night train that came in the same way, up on the main track, from Des Moines, and there was a dining car that came up from Omaha, and these coaches and dining car were turned at night and this switch was used at night, as well as in the daytime, for turning trains. The only way by which trains or cars which were headed north could be turned so as to head them south was over this switch, except they could be taken to the* roundhouse and turned on the turn-table. There was a fast passenger train from Kansas City due at 1:45 A. M. and a

freight train due about 3 or 4 o'clock A. M. *The method employed in doing that work was to run them over this switch in question. At times, there were a good many extra passenger trains from the south. Cars from four sidetracks in the yards, when they were pulled off from the south* end by *the night crew, would come over this switch in question.*

No member of the night crew was called to testify concerning the switching of the cars during the night previous to the accident and up to seven o'clock in the morning of the day of the accident. Moreover, on cross examination, *the members of the day switching crews were unable to state specifically the particular places that they did their switching on the day and before the accident, except that they were in accord in stating that they did not do any switching over this particular switch that had been left unlocked and which caused the injury and death of Spellman.* (Transcript of Record, pages 72 and 73.)

The statement of plaintiff in error that "the padlock was battered *as though it had been pounded open and heavy spike was found lying near*", is not sustained by the facts in the record. It is true that a witness for the railroad company testified that there were some marks on the ring of the lock, and that he found a railroad spike on the head block or large timber that supports the switch stand. That this spike *was about five or six inches long, about an inch square and weighed about a third of a pound.*

The testimony shows that the switch in question *was near to fifteen or twenty residences of the employees of the railroad company and four or five of these were within 100 to 150 feet of this switch, and there is no testimony that any intermeddler or other persons were seen about the switch at any time on the day of and before the accident, although it was in plain view, and there is no testimony showing or tending to show that any key to this lock on this switch had been lost or had come into the possession of any other person.*

BRIEF OF ARGUMENT.

THE ACTION WAS NOT BARRED BY THE STATUTE OF LIMITATIONS.

I.

The appellee does not concede, nor did the Supreme Court of Iowa concede, that the original petition in this cause stated a cause of action under the state law, and that the amendments thereto changed the action to one under the federal act, but it is true, that both the Iowa trial and Supreme Courts held that the petition as amended, did not state a new cause of action and that the plea of the statute of limitations was not a good defense.

II.

From the averments of the original petition it was shown, that at the time of the injury, the engineer was engaged in an act of interstate commerce in that he was running an engine drawing an interstate train. That he was injured one day and survived his injury until the following day, and then died as a result of his injury. Under this state of facts, the liability of the company, if any, was to be determined by the Federal Employers' Liability Act. The Iowa statute was not applicable.

Mondau vs. Railroad, 223 U. S. 1;
Railroad vs. Wulf, 226 U. S. 570;
Michigan Central R. R. vs. Vreeland, 227 U. S. 59;
St. Louis & San Francisco Ry. vs. Seale, 229 U. S. 156;
Seaboard Airline R. R. vs. Renn, 241 U. S. 290;
McCullough vs. Railroad Co., 160 Iowa, 524;
North Carolina Railroad Co. vs. Zachary, 232 U. S. 248.

III.

It appearing from the averments of the original petition that John J. Spellman at the time of his injury was engaged in interstate commerce, the amendments to the petition *merely expanded or amplified* what was alleged in support of the cause of action already asserted, and these amendments *related back to the commencement of the action and was not affected by the intervening lapse of time.*

Seaboard Airline Ry. Co. vs. Renn, 241 U. S. 290;
Missouri, Kansas & Texas Ry. Co. vs. Wulf, 226 U. S. 570;
Texas & Pacific Ry. vs. Cox, 145 U. S. 593;
Atlantic & Pacific R. R. vs. Laird, 164 U. S. 393;
Hutchinson vs. Otis, 190 U. S. 552.

IV.

The original petition stated facts which showed that Spellman was engaged in interstate commerce at the time of his injury and plaintiff's cause of action could not be abated or arrested for *any defect or want of form*, and it was the duty of the court to *"amend every such defect and want of form"* and to permit plaintiff *"to amend any defect"* therein, under the express provisions of Section 954 of the Revised Statutes of the United States.

(4 Fed. Statutes Ann. 1st Edition, page 596, and authorities cited.)

V.

Counsel for the railroad company *correctly construed the averments of the original petition as stating a cause of action under the federal law, when they filed their demurrer thereto, claiming:*

First: That from the allegations of the petition John J. Spellman was at the time of his injury engaged *in an act of interstate commerce.*

Second: That the right of action upon the allegations of the petition accrued to the said Spellman *under the Act of Congress approved April 22, 1908.*

Third: That no right of action accrued under the laws of the state of Iowa. (Transcript 3.)

VI.

In the motion of counsel for the railway company to direct a verdict on the trial of the cause, *there is no claim that the original petition or the petition as amended stated a cause of action under the state law.* Moreover, the 6th and last ground of the motion to direct a verdict, *was based upon the theory of the demurrer that "the cause of action set up in pliantiff's petition did not survive the death of the said John J. Spellman.* (Transcript, 41-42.) When if the action was maintainable under the state law, *there would be no question of survivor.*

VII.

The trial court submitted the case *on the theory that the liability, if any, was under the Employers' Liability Act.* (Transcript, 50-51.)

VIII.

In the instructions asked by the defendant on the trial of this cause, the third instruction requested, was to the effect, *that the decedent Spellman was guilty of contributory negligence as a matter of law, and that the jury should take into consideration this fact and reduce their verdict, which instruction was in harmony with the Federal Employers' Liability Act.* (Transcript, 42.)

IX.

The fourth instruction requested by the defendant, was upon the theory that the recovery should be *the pecuniary loss to Mrs. Spellman alone,* and that money earned by Spellman

and given to her which she did not use for her own personal support could not be recovered, *which was in conflict with the rule obtaining in the State of Iowa at the time of the injury and death of Spellman on the question of the measure of damages.* (Transcript, 42.)

X.

The record fails to disclose that counsel for defendant at *any time during the trial of this cause in the District Court of Iowa, in and for Polk County, made any claim that the action stated in the original petition or in the petition as amended was an action brought under the state law. This claim not having been made in the trial court, and the claim that the action in the original petition stated a cause of action under the Employers' Liability Act, and the court having submitted the cause to the jury upon that theory, then if the trial and Supreme Courts of Iowa were wrong in so holding the plaintiff in error is not entitled to have the judgment reversed. It cannot complain of a course to which it assented below.*

Minneapolis & St. Louis R. R. vs. Winters, 242 U. S. 353.

XI.

"In short, at the trial, the defendant in no way saved its rights to deny that the parties were engaged in interstate commerce at the time of the accident, or to object to the application of the federal statute. On the contrary, without qualification it invoked and relied upon that statute and the rights that because of that statute it supposed itself to possess."

Minneapolis & St. Louis R. R. vs. Winters, 242 U. S. 353.

XII.

The claim made in the demurrer to the original petition by the railroad company, was that the petition stated a cause of action under the Federal law and not under the state law, and that the Federal law did not provide that a right of action accruing to an employee should survive his death, and that no right of action accrued on account of the death of Spellman to his personal representative, for the reason that the death of Spellman was not instantaneous. This demurrer was overruled and the record *does not disclose the reasons* why this demurrer was overruled, but counsel for plaintiff in error, *without any basis in the record*, assert that the trial court in overruling the demurrer, held that defendant's counsel was wrong in their construction of the pleading, "and sus-

taining plaintiff's contention that it stated a cause of action under the state law."

Brief and Argument for Plaintiff in Error, page 45.

XIII.

There is nothing in the record showing, or tending to show, what the contention of plaintiff was with respect to the demurrer filed by the railroad company. If we are to indulge in conclusions, we might well conclude that the demurrer was overruled *for reasons so ably expressed by this court in the case of Michigan Central R. R. Co. vs. Vreeland, 227 U. S. 59,* wherein this court held, that the cause of action *did survive, which effectively disposed of the demurrer.*

XIV.

Counsel for plaintiff in error indulge in much speculation as to what was in the mind of the pleader when the original petition was drawn. They were not in such confusion when they demurred to the petition, averring that Spellman at the time he was injured was engaged in an act of interstate commerce, that the right of action upon the allegations of the petition, accrued under the Employers' Liability Act and that *no right of action accrued under the laws of the state of Iowa, because the Federal law was exclusive and superseded all laws of the state on the subject.*

XV.

This court will determine the question of whether the original petition stated facts which brings this case under the Federal law, *from the allegations of the petition, without reference to speculating as to what was in the mind of the pleader, and from the facts pleaded in the original petition,* which show that at the time of the injury, the engineer *was engaged in an act of interstate commerce, and the liability of the company, if any, was to be determined by the Federal Employers' Liability Act.*

XVI.

The seventh assignment of error is based upon the claim, that the Supreme Court of Iowa denied to plaintiff in error a right and an immunity granted to it by a proper construction and application of the Employers' Liability Act, "by holding and deciding that notwithstanding this action was originally brought under the laws of the State of Iowa, amendments filed more than two years after the cause of action arose, claiming the right to recover under the Act of Congress called

the Employers' Liability Act, did not state a new cause of action." The Supreme Court of Iowa *did not hold or decide that this action was originally brought under the laws of the State of Iowa.*

XVII.

The Supreme Court of Iowa held, both in its first and second opinions, *that plaintiff had the right to amend his petition and in the last opinion the Supreme Court of Iowa held,* IF IT BE ASSUMED that the original petition *stated a cause of action under the state law,* still the plaintiff had a right to amend his petition so as to recover under the Employers' Liability Act. There is no foundation, therefore, for such an assignment laid in the proceedings before the trial court, where the railway company *was contending that the original petition stated a cause of action under the Employers' Liability Act.* (Transcript, 93.)

XVIII.

This appeal from the decision of the Supreme Court of Iowa, is merely upon a *moot, fictitious or assumed case* and the plaintiff in error is seeking to have determined an abstract question, *which does not arise upon the facts in the record or the law applicable to this case.* This court does not decide moot or fictitious cases.

Swift & Company vs. Hocking Valley Ry. Co., 243 U. S. 281, 289;
Pennsylvania Company vs. Donat, 239 U. S. 50;
California vs. San Pablo & Tulare R. R. Co., 149 U. S. 308, 314;
Mills vs. Green, 159 U. S. 651, 654.

XIX.

The doctrine of the *moot or assumed* case of the Supreme Court of Iowa, *is sustained by the case of Missouri, Kansas & Texas Railway Co. vs. Wulf*, 226 U. S. 570, 576, as construed by this court in *Taylor vs. Taylor*, 232 U. S. 363, 368.

XX.

The ninth assignment of error is made upon the claim that the Supreme Court of Iowa denied to the plaintiff a right granted to it by a proper construction of the Employers' Liability Act by "holding and deciding that an amendment to the petition, made two years after the commencement of the action, changing the action from one under the state law to one under the Act of Congress, by which there was a de-

parture from law to law, was permissible and that the petition as thus amended was not subject to the defense of the statute of limitations." There is no foundation for this assignment of error, because the defendant in the trial court, *contended that the original petition stated a cause of action under the Employers' Liability Act, and "that no right of action accrued under the laws of the State of Iowa."* (Transcript, 3, 101 and 102.)

Minneapolis & St. Louis Ry. vs. Winters, 242 U. S. 353.

XXI.

The transcript of the record in this court *does not contain any assignment of errors*, if any was made, *on the appeal to the Supreme Court of Iowa from the trial court.* Having made *no claim in the trial court that the original petition stated a cause of action under the state law*, but on the contrary, *having contended that the original petition stated a cause of action under the federal law*, the railway company *cannot complain of a course to which it assented below.*

Minnesota & St. Louis R. R. Co. vs. Winters, 242 U. S. 353.

XXII.

The case of *Union Pacific Railway Company vs. Wyler*, 158 U. S. 293, is not applicable nor in point and does not sustain the plaintiff in error, for the following reasons:

1. The original petition in the case at bar, stated facts showing that Spellman was at the time of his injury *engaged in an act of interstate commerce* and that the right of recovery for his death, if any, *must be determined* by the Federal Employers' Liability Act.

2. The defendant took the position in the trial court that upon the allegations in the original petition *"no right of action accrued under the laws of the state of Iowa,* said act (Federal Employers' Liability Act) *being exclusive and superseding all laws of the state on the subject."*

3. The trial court submitted the case on the theory of *both* the parties thereto, *that liability, if any, was under the federal and not under the state statute.*

4. In the *Wyler* case, the original petition was based upon the common law of master and servant and averred that plaintiff was injured in the state of Kansas and that the injury was due to the negligence of defendant in employing and retaining in its employ an incompetent person, a fellow servant, with knowledge of his incompetency.

5. Afterwards, an amended petition was filed eliminating the charge of incompetency of the fellow servant and de-

fendant's knowledge of such incompetency, and *rested the cause of action exclusively upon the negligence of Kline as a fellow servant of plaintiff, averring that the employer was liable to the plaintiff for the injury suffered by him through such negligence because a right of action was given in such case by the law of Kansas where the accident occurred.* This action was commenced in the state court of Missouri and afterwards removed to the U. S. Circuit Court. This court held that the amended petition introduced a substantially new cause of action, to which the statute of limitations applied.

6. It is made plain in the opinion of this court in the *Wyler* case, that the amended petition set up not only a *different state of facts* but a *different rule of law* as the ground of action. The original petition proceeded on the common law rule which held the master liable who with knowledge employs and retains an incompetent servant, and made no reference to the Kansas statute, nor averred negligence on the part of the fellow servant, except so far as might be inferred from the averment of his incompetency; while the amendment relied upon the fellow servant's mere negligence together with a statute of Kansas which made the master responsible for the consequences of the negligence of a fellow servant.

Missouri, Kansas & Texas Ry. vs. Wulf, 226 U. S. 570-577.

7. The action having been commenced in the Missouri court, which *would not take notice* of the Kansas statute *unless it were pleaded*, this court held that the rule that the Federal courts take *judicial notice of the laws of the several states did not apply.*

8. That in the case at bar, the federal statute did not need to be pleaded for the *original petition set out facts showing that Spellman was engaged in an act of interstate commerce at the time of his injury*, and that the question of liability must be determined under the Federal Employers' Liability Act, and the amendments to the petition were merely *amplifying the cause of action stated in the original petition.*

Missouri, Kansas & Texas R. R. vs. Wulf, 226 U. S. 570;

Seaboard Airline Ry. Co. vs. Renn, 241 U. S. 290.

XXIII.

In *Taylor vs. Taylor*, 232 U. S. 363, in construing the decision of the court in the case of *Missouri Kansas & Texas vs. Wulf*, 226 U. S. 570, it is said, "The action was brought by the mother of a deceased employe in interstate commerce *under the state statute.* The petition was subsequently amended to embrace a right of action by her *under the Federal law* as the

personal representative of the decedent. The amendment was held not to be the commencement of a new action. It was said that notwithstanding the original petition asserted a cause of action *under the state statute* without making reference to the act of Congress, the court was presumed to be *cognizant of the Federal enactment* and *"to know that, with respect to the responsibility of interstate carriers by railroad to their employees injured in such commerce after its enactment it had the effect of superseding state laws upon the subject."*

XXIV.

Even though it be conceded that the railway company, at the time of the trial, *raised the question that the original petition stated a cause of action under the state law,* and that the amendment *changed the cause of action to the Federal law* and that the Supreme Court also found that the original petition stated a cause of action under the state law and the amendment changed the cause of action to the Federal law, *it would be apparent that the defendant in its claim and the Supreme Court in its finding, would be in error, because the statements in the original petition show that* if any cause of action arose on account of the death of Spellman, *it was because of the provisions of the Federal Employers' Liability Act, for it appears on the face of the original petition that at the time Spellman was injured he was performing an act of interstate commerce.*

XXV.

It became and was the duty of the trial court, and of the Supreme Court of the State of Iowa, to determine as both courts did determine, that from the facts stated in the original petition the question of liability was to be determined under the Federal law, and *not under the state law,* and that the amendments to the petition *merely expanded or amplified what was alleged in support of the cause of action already asserted and related back to the commencement of the action and was not affected by the intervening lapse of time.* *Seaboard Airline Ry. Co. vs. Renn,* 241 U. S. 290.

XXVI.

The fact that the Supreme Court of Iowa after so determining, stated the *assumed case,* that even though the record showed that the original petition stated a cause of action under the state law, and the petition as amended stated a cause of action under the Federal law, the statute of limitations would not apply, if erroneous, would not entitle the

plaintiff in error, to a reversal of this cause, *for the reason that the original petition did not state a cause of action under the state law,* and *the railroad company contended at the trial court that the original petition stated a cause of action which was governed by the Federal and not the state law.*

XXVII.

If it be conceded that the petition as originally drawn, *stated a cause of action under the state law,* and this court should so determine, the plaintiff in error *would not be entitled to a reversal, because the railroad company claimed in the trial court, that from the allegations of the petition, "no right of action accrued under the laws of the state of Iowa, and that the Federal Act was exclusive and superseded all of the laws of the state of Iowa on the subject."*

Minnesota & St. Louis R. R. Co. vs. Winters, 242 U. S. 353.

XXVIII.

Mrs. Fannie L. Spellman was the sole beneficiary if the action arose under the Federal Employers' Liability Act being the only dependent, and she was, at the time and prior to the time the suit was brought, *the sole beneficiary,* if the *liability arose under the state law, for she was the assignee of the interests of all the other heirs in the estate of John J. Spellman, deceased.* (Transcript, 33-34, 57.)

THE QUESTION OF THE NEGLIGENCE OF THE DEFENDANT WAS A QUESTION OF FACT TO BE DETERMINED BY THE JURY AND THERE IS AMPLE EVIDENCE TO SUSTAIN THE VERDICT.

I.

The following are undisputed facts:

1. The injury occurred because a switch leading from the main line of the defendant's track, had been unlocked and left open, so that the passenger train left the main line when it reached the switch, and the engine was turned over, discharging hot water upon Spellman, from the effects of which he died, the following day.

2. That at the time of the derailment of his train and his injury, he was engaged in running an engine drawing a passenger train engaged in interstate commerce.

3. That this switch when closed had been kept locked with a padlock and before it could be opened or partly opened and turned the padlock would have to be unlocked

and the lock removed from the eye and the handle raised. The evidence shows that when the train was derailed, *a human hand had unlocked this switch, had removed the padlock from the eye, had raised the handle and hung the padlock back in the eye,* and that the lever had been moved so that the switch was only partly closed, and the flanges of the locomotive wheels left the rails of the main line and turned to the right on the switch track leading from the main line and then the locomotive turned over, discharging hot water and scalding the engineer so that he died the following day. (Transcript, 6, 8, 10, 16.)

4. *The different switchmen who had occasion to open and handle switches, the engineers, and the various trainmen, were supplied with keys to this lock.* (Transcript, 18-19.)

5. Adjoining this main line track was a side track a few feet to the right. (Shown by the photographic exhibits "A" and "B" of Transcript 35 and 37.)

6. *There was a night switching crew going on at seven o'clock at night, off at seven o'clock in the morning.* (Transcript, 71.)

7. This night switching crew went with their switch engine *to any part of the yards around the storage tracks and would switch out cars to take to the shops.*

8. If this night crew switched out cars on this track immediately to the right of the main line, they had to take the cars there up the Y track or up the main track. (Transcript, 71.)

9. *This night crew would turn coaches which came in on a night train from Des Moines and a dining car that came up from Omaha was turned at night, and this switch was used in the nighttime for turning these coaches and trains.* (Transcript, 15, 71.)

10. *The only way by which trains or cars which were headed north could be turned south was over this switch, except they could be taken to the roundhouse and turned on the turntable.* (Transcript, 71.)

11. *The method employed in doing that work was to run them over the Y track and through this switch.* (Transcript, 71.)

II.

No member of the night switching crew was called or testified for the railway company, but some of the members of the four day switching crews testified to switching in the yards on the morning of the day of the accident, going on duty at seven o'clock, and all testified that they did not switch over the switch, on the day of and *before* the accident, but on cross examination, *none of them pretended to know the*

specific switches they made or particular places in the yards the switches were made.

III.

There is no claim that any of these keys to this lock were lost or in the possession of others than the switchmen and trainmen or the section foreman.

IV.

The claim that an engine and tender running about ten miles an hour, passed through the switch, arises from the testimony of the fireman and conductor, who testified that the switch was closed when the engine and tender went north over the switch. But on cross examination, these witnesses *admitted they were not giving any particular attention to this switch, nor thinking at the time they passed over it, as to what its condition was.*

V.

The fact, if it be a fact, that fifteen or twenty minutes before the passenger train was derailed, a freight engine and tender went north through this switch, *running at the slow speed of about ten miles an hour,* is not at all conclusive that at that time this switch was not unlocked and the lock hanging in the hasp, *for it is a matter of common knowledge, that railway tracks, especially at switch points, are not rigid and firmly set and that the flanges of engine and car wheels are sometimes worn, thus making it probable that the engine and tender could have gone over the switch, running slowly, even though the switch point was slightly away from the rail.*

VI.

The record discloses that there is some play between the wheels of cars and engines and the rail; that they do not fit tightly. (Transcript, 30, 5th and 6th lines from the bottom.)

VII.

Even though the engine and tender was able to pass north without difficulty, the passage of the engine and tender over the switch, if unlocked, *would be likely, to in some degree to change the position of the switch point, so that the passenger train, coming at a very much greater rate of speed, would not* pass through the switch.

VIII.

The theory of the plaintiff in error, that within fifteen minutes after this slowly moving engine and tender went north over this track and the happening of the accident, some one unlocked this lock and hung it in the eye of the hasp in broad daylight, within one hundred and fifty feet of houses of employees of the defendant railway company, and derailed the passenger train, *in the absence of any evidence showing the presence of any person, is unthinkable and untenable.*

IX.

If there were such persons, they would not only have been in *plain view of the occupants of the houses, for there was nothing to obstruct, but the danger of being observed by those upon the engine and tender passing north and those upon the passenger engine coming in, would have deterred them from any such act.*

X.

There was a claim made that the lock *could be opened without a key, by jerking on a chain, but there is no testimony, showing or tending to show, that with the chain anchored to the switchstand, as shown in the photograph Exhibit "C" on page 3 of the Transcript, the lock could have been opened by jerking on the chain.* (Transcript, 76.)

XI.

There was testimony that there was a new railroad spike laying on the switchstand and that there were marks on the ring of the lock. *There was no testimony that by the use of this railway spike striking on the frame of the lock the lock could be unlocked. This spike weighed about five ounces.* (Transcript, 17.)

XII.

The photograph Exhibit "C", Transcript 39, was taken about two weeks after the accident. (Transcript 11.) At that time the ring of the hasp is shown to have been worn exposing through the worn place the rim of the lock and indicating that, notwithstanding the awful tragedy of two weeks before, this company was still exposing its employees and passengers to the danger of this main line switch being left open again. The eye of the hasp was worn through some-

thing less than a quarter of an inch at the time of the accident. (Transcript 10.)

XIII.

No other railroad than the defendant's railway used this switch and no other railway switched cars in the yards of the defendant railway company at Oelwein.

XIV.

This switch was within a *hundred to a hundred and fifty feet of residences occupied by employes of defendant railway company and there was no obstruction from these residences preventing a view of this switch,* and there is no evidence showing, or tending to show, *that there were any meddlers or persons trespassing upon the railway tracks or in and about this switch, before the derailment on the day and before the derailment of this train.*

XV.

The trial court instructed the jury that before the plaintiff could recover they must find,

First: That Spellman came to his death as the result of the derailment and overturning of the engine while in the employ of the defendant in the discharge of his duties as engineer. (Transcript, 48.)

Second: That the derailment and overturning of the engine was due to the negligence of the defendant in one or more of the acts of negligence. (Transcript, 48.)

Third: That the injury received as a result of the derailment and overturning of the engine, and the death of Spellman were occasioned directly and approximately by such negligence. (Transcript, 48.)

Fourth: That Spellman left Fannie L. Spellman as his surviving widow. (Transcript, 48.)

Fifth: That Fannie L. Spellman, surviving widow, had been damaged in some amount because of the death of her husband. (Transcript, 48.)

Sixth: That the fact that an accident may have happened and the deceased sustained an injury from which his death resulted, did not raise the presumption that the defendant was negligent, for negligence must be proven. (Transcript, 51.)

Seventh: That the defendant was not an insurer of its employes and was only liable when it was shown to have been guilty of one or more of the acts of negligence charged. (Transcript, 52.)

Eighth: That the evidence showed without dispute that an open switch caused the derailment and overturning of the engine which resulted in the injury to and death of Spellman, and that one of the acts of negligence charged in the petition was that the open switch was due to the negligence of employes of the defendant company, while handling and moving cars in the yards of the defendant railway company. That said switch remained open at a time when the defendant company and its employes knew that the train on which Spellman was engineer was due to arrive at the place where such switch was located. That if they found from all the evidence that plaintiff had established by a preponderence of the evidence that the switch in question was opened by employes of the defendant company while handling and moving cars in the railroad yard of the defendant, and remained open at a time when the defendant company knew, or, in the exercise of ordinary care, should have known, that the engine on which Spellman was engineer was due to arrive at said switch, they would then be justified in finding that the defendant was negligent and that said negligence was the approximate cause of the death of Spellman. (Transcript, 49.)

XVI.

The general and special verdicts of the jury were amply sustained by the following facts and circumstances:

1. The undisputed evidence that the derailment and overturning of the engine was due to the open switch.
2. That this open switch *was locked* with a padlock.
3. *That the trainmen and switchmen had keys to this lock.*
4. *That this switch was used nightly by the night crew to turn cars coming from the south and west so as to return south, and when getting out cars in bad order from sidetracks to be taken to the shops.*
5. *That the railroad company did not call any member of the night crew to testify.*
6. *That there was no claim that any of these keys had been lost.*
7. That the switch at the time of the accident, *had been opened by a human hand, the lever raised and the ring of the lock hung in the eye of the hasp.*
8. The circumstance that this switch was within 150 feet of residences and in plain view thereof. Moreover, there *was no evidence that any intermeddler or trespasser had been seen about this switch on the day and previous to the accident.*

XVII.

The general and special verdicts of the jury were amply sustained by the evidence and from this evidence and the circumstances, they had the right to find that the switch had been negligently left open by a switchman or trainman of the defendant railway company, and that the *defendant was negligent in that its trainmen had negligently opened and left open the switch, thereby making the main line of the railway company track at that place unsafe.*

XVIII.

The jury had the opportunity of seeing and hearing the defendant's witnesses when placed upon the stand to testify as to the use or non-use of the switch, and as to its condition between seven o'clock in the morning of the day of the accident down to the time of the accident and to determine the credibility of these witnesses by their demeanor while testifying. Even though the testimony of the inspector and the day switchmen and trainmen placed upon the stand by the defendant was undisputed, *except by the circumstantial evidence sustaining plaintiff's theory, the jury was not bound to accept the statement of defendant's witnesses and discard the circumstantial evidence.*

XIX.

The jury was not bound to accept as true the positive evidence of witnesses, *where there was circumstantial evidence tending to show that the testimony of the witnesses was not true.*

Mercantile & Bank Co. vs. Landa, 40 S. W. 406;
Lavalleur vs. Hahn, 149 N. W. (Ia.) 257;
Bradley vs. Gorham, 58 Atl. 698;
Chezem vs. State, 76 N. W. (Neb.) 1056;
Lantner vs. Kamm, 39 Atl. 55.

XX.

This court will take judicial knowledge of the fact that derailment accidents do not ordinarily happen, *unless the company and its employees fail to exercise care. This is the rule.* The "track walker", and the alleged inspector, *whose duties were so numerous and covered the vast field embracing the Oelwein yards, with its miles and miles of trackage, to be inspected within the short time he was required to do it, and the calling of members of day crews who claimed to have had nothing to do with switching of cars over this particular switch, and the failure to call the night crew who were*

constantly switching cars over the switch, was not sufficient to overcome the circumstantial evidence nor to take this case from the jury on the question of the railroad's negligence.

XXI.

Where there is a collision or derailment of cars or engines while in operation of a railroad, *the presumption of negligence arises.*

Hemphill vs. Buck Creek Lumber Co., 54 S. E. (N. C.) 420;
Wright vs. Railroad, 35 S. E. (N. C.) 423;
Kinney vs. Railroad, 30 S. E. (N. C.) 313;
Grant vs. Railroad, 13 S. E. (N. C.) 209;
Stewart vs. Railroad, 50 S. E. (N. C.) 312;
Mobile J. & K. C. R. Co. vs. Hicks, (Miss.) 46 So. 360, 390, 391;
Anderson vs. St. Louis & S. F. R. Co., (Mo.) 130 S. W. 82, 84;
Van Inwegen vs. Erie R. Co., (N. Y.) 126 App. Div. 297, 110 N. Y. Supp. 959; affirmed in 194 N. Y. 534, 87 N. E. 1128.

XXII.

The claim of plaintiff in error, *that the evidence goes no further than to show that the switch was partly open, resulting in the derailment of the engine and causing the fatal injuries to Spellman, is overthrown by the many facts and circumstances already set forth in the propositions and points stated. The contention of plaintiff in error that the happening of the accident did not raise a presumption or inference of negligence, was presented to the jury by the trial court in its instructions.* (Transcript, 51-52, Instruction 8 given to the jury.)

XXIII.

The trial court did not instruct the jury that the doctrine of *res ipsa loquitur* was applicable to the case. (Transcript, 47-48, Instructions 1 and 2; pages 48-49, Instructions 3 and 4; pages 51-52, Instruction 8 given to the jury.)

XXIV.

The presiding judge at the trial court, *heard the evidence and saw the witnesses and was informed as to their manner and demeanor while testifying, and was in a better position to determine the question of whether the evidence was sufficient to sustain the verdict, than the judges of the Supreme*

Court of Iowa or the members of this court, and with such knowledge and better opportunity, after due deliberation, held that the verdict was sustained by the evidence and overruled the two motions of the railroad company for an instructed verdict, and its motion for new trial, wherein it was stated that the verdict was not sustained by the evidence. (Transcript, 13, 41-42, 55.)

XXV.

"It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact, and that ordinarily negligence is so far a question of fact as to be properly submitted to and determined by them. Hence, it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. *He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment. And if such judgment is approved by the proper appellate court, this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions.*"

Patton vs. Texas & Pacific Ry. Co., 179 U. S. 658, 660.

XXVI.

The Supreme Court of Iowa *affirmed the judgment of the court below without dissent, and found that the verdict was sustained by the evidence, after a very able and exhaustive analysis and review of the facts and circumstances disclosed in the record.* (Transcript, 81-89.)

XXVII.

It is true the Supreme Court of Iowa held, that the doctrine of *res ipsa loquitur* was applicable, and sustained this contention in an unanswerable argument. Plaintiff in error contends that the Supreme Court of Iowa was in error in so holding and that this court has held to the contrary, citing *Patton vs. Texas & Pacific Ry. Co.*, 179 U. S. 658, and *Texas &*

Pacific Railway Co. vs. Barrett, 166 U. S. 617, and in addition a number of cases from other jurisdictions.

XXVIII.

There is no specific reference to the doctrine of *res ipsa loquitur in the case of Railway vs. Barrett, supra.* The opinion of this court sets out the instructions at the trial court which are very similar to the instructions of the trial court given to the jury in the case at bar and approved the instructions and affirmed the judgment of the Circuit Court of Appeals. In the case of *Patton vs. Railway Company, supra*, this court held, first, that in the case of a passenger, the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which, in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, if there is *prima facie* a breach of his contract to carry safely, a different rule obtains as to an employe; second, that in a case of an employe it is not sufficient to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was, and where the testimony leaves the matter uncertain, and shows that *any one of a half dozen things may have brought about the accident, for some of which the employer is responsible, and for some of which he is not*, it is not for the jury to guess between these half dozen causes, and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion.

XXIX.

Under the Federal Employers' Liability Act it is expressly provided that a co-employe may recover from a defendant railway company for injury or death "resulting in whole or in part from the negligence of any of *the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence*", *in its appliances, machinery, track or roadbed.*

Federal Statutes Ann. 1909, 584.

XXX.

This was not the law at the time of the decision of the two cases from this court which plaintiff in error cites. There is no evidence in the record showing or tending to show that this switch was or could have been unlocked while the chain of the lock was fastened to the switchstand, by *any other person than by the officers, agents, or employees of the carrier, and the very basis of the rule in the Patton case is not found in the record of the case at bar.*

XXXI.

The claim of the plaintiff in error, that a meddler or a criminal unlocked this switch and was so careful after unlocking it to raise the lever and hang the lock in the eye, *has absolutely no support in the evidence and embodies within it a presumption, first, that some trespasser or criminal was there, and second, that the imaginary meddler or wrongdoer committed a crime, and this claim is built on the theory, first, of a presumption, without any foundation whatever of the presence of some one;* second, *of a presumption on this presumption, that a crime was committed. There is no evidence to support the first presumption, and there is no case holding that a presumption of fact can be based upon an inference or upon another presumption.*

U. S. vs. Ross, 92 U. S. 281, 283;
Lawson's Law of Presumptive Evidence, 2nd Ed. 652 and authorities cited.

XXXII.

There can be no logical reason for denying the principle of *res ipsa loquitur* in the case at bar, *because the master was liable for the negligence of fellow servants and the testimony shows that the conditions existing which caused the injury were due to the negligence of fellow servants and were not due to other causes.* An examination of the other cases cited by the plaintiff in error will show, that they are mainly bottomed upon the proposition that the record showed the injury *might be due to many other causes than the negligence of the defendant, or that the master was not liable for the negligence of fellow servants whose negligent acts might have caused the injury.*

XXXIII.

None of the cases cited are applicable to the case at bar; first, *because the circumstances established in the case at bar without dispute, in addition to the happening of the accident, make the case at bar one wherein the doctrine of res ipsa loquitur does apply. Moreover, the provisions of the Federal Act, which makes the master liable for the negligence of fellow servants, or the officers, agents or employes of the railway company, alone distinguishes the case at bar from those cited and relied upon by the plaintiff in error.*

XXXIV.

This court held in the case of *Inland & Seaboard Coasting Company vs. Tolson*, 139 U. S. 551, that it would be *prima*

facie evidence of the defendant's negligence, *if the steamboat was thrown with such force against the wharf, properly built, as to tear up some of the planks; or if it was dangerous to make a stern landing, with neither captain nor pilot in the pilot-house, and under the other circumstances proved, thus applying the doctrine of res ipsa loquitur.*

XXXV.

"As such damage to a wharf is not *ordinarily done* by a steamboat under control of her officers and carefully managed by them, evidence that such damage was done in this case, was *prima facie*, and, if unexplained, sufficient evidence of negligence on their part, and the jury might properly be so instructed."

Inland & Seaboard Coasting Co. vs. Tolson, 139 U. S. 551, 555, citing the following cases;
Stokes vs. Saltonstal, 13 Pet. 181;
Transportation Co. vs. Downer, 11 Wall. 129, 134;
Railroad Co. vs. Pollard, 22 Wall. 341;
LeBarron vs. East Boston Ferry, 11 Allen 312, 317;
Feital vs. Middlesex Railroad, 109 Mass. 398;
Rose vs. Stephens & Condit Co., 11 Fed. Rep. 438.

XXXVI.

The best considered case on the question of when the doctrine of *res ipsa loquitur* applies, by any Federal court is the decision by Judge Lurton, (afterwards Justice Lurton) when Circuit Judge in the Circuit Court of Appeals, Sixth Circuit, in the case of *Cincinnati, N. O. & T. P. Ry. Co. vs. South Fork Coal Co.*, 139 Fed. 528, wherein he exhaustively discusses the subject, *citing and distinguishing most of the cases cited and relied upon by the plaintiff in error, and held that these cases in holding that in actions by employees for negligent injuries of an accident carried with it no presumption of negligence, were based on the reason that the employe assumed the risk incident to his employment including the negligence of his fellow servants and he must therefore show the injury of which he complains was the result of a risk he did not assume, and for these reasons the cases were not in point.*

XXXVII.

Whether the happening of an injurious accident raises a presumption that it was due to negligence, *depends upon the nature of the accident and the surrounding circumstances which characterize it*, and the relation of the parties affecting the measure of care required of the one sought to be

charged. While the mere happening of the injury does not raise such presumption, *it may reasonably be ascribed to negligence, if it was not likely to occur if due care had been exercised.*

Cincinnati, N. O. & T. P. Ry. Co. vs. South Fork Coal Co., 139 Fed. 528.

XXXVIII.

The Supreme Court of Iowa in holding that the doctrine of *res ipsa loquitur* applied to the case at bar, adopted the principle announced by this court in *Seaboard Coasting Company vs. Tolson*, 139 U. S. 551, 555, and the principle announced by Judge Lurton in the case of *Cincinnati, N. O. & T. P. Ry. Co. vs. South Fork Coal Company*, 139 Fed. 528, as will be seen by reference to pages 81 and 82 of the Transcript.

XXXIX.

This court in the case of *Sweeney vs. Erving*, 228 U. S. 233, has *in effect* stated the principle announced by the Supreme Court of Iowa in this case, by holding that "it is recognized that there is a class of cases where the circumstances of the occurrence which has occasioned the injury are of a character to give ground for a reasonable inference that if due care had been employed, by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, *res ipsa loquitur, the thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence.*"

Sweeney vs. Erving, 228 U. S. 233, 238.

XL.

"In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; *that they make a case to be decided by the jury*, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. *When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff.*"

"Such, we think, is the view generally taken of the matter in well considered judicial opinions."

Sweeney vs. Erving, 228 U. S. 233, 240.

XLI.

The rule that the doctrine of res ipsa loquitur, does not apply to *actions by servants has no application under the Federal Employers' Liability Act, which abolished the fellow servant rule.*

Southern Ry. Co. vs. Derr, 240 Fed. 73, (C. C. A. 6th Circ. March 6, 1917);

Ridge vs. Norfolk Southern R. Co., 83 S. E. (N. C.) 762.

XLII.

The fact that a switchman, who had been employed in the same railroad yard for 25 years, and who must have been thoroughly familiar with the movement of trains therein, and with all the customs of the yard, was run down and killed in the yards by a car, *raises the presumption that some abnormal and unexpected condition prevailed, since it is contrary to ordinary intelligence that such a man would have remained on the track, if adequate warning had been given.*

Delaware L. & W. R. Co. vs. Hughes, 240 Fed. 941, 942, (C. C. A., 2nd Circ. 1917).

XLIII.

This court has held that a brakeman, who was thrown from a train carrying interstate commerce and was killed as the result of couplers coming open while the train was in motion, in view of the Safety Appliance Act, *negligence might be inferred from the mere opening of the couplers.*

Minneapolis & St. L. R. R. Co. vs. Gotschall, 244 U. S. 66.

XLIV.

Under the provisions of Sec. 1 of the Federal Employers' Liability Act, it is provided that every railroad while engaged in interstate commerce "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his personal representative for the benefit of the surviving widow, etc., where the injury or death resulted in whole or in part from the *negligence of any of the officers, agents or employees of such carrier or by reason of any de-*

fect or insufficiency due to its negligence in its appliances, track or roadbed." It was held by the Circuit Court of the Northern District of Illinois, Eastern Division, in a case involving a similar Kansas statute, that the rule of *res ipsa loquitur* applied to a case of injury to an employe from the collision of two trains of the company, and raised a *presumption of negligence.*

Iarussi vs. Missouri Pacific Ry. Co., 155 Fed. 654, and this case was affirmed by the Circuit Court of Appeals, Seventh Circuit, 161 Fed. 66.

To the same effect see *Schuler vs. Omaha, K. C. & E. R. Co.*, 87 Missouri Appeals, 618.

XLV.

There is no hard and fast rule that the doctrine can in no case be applicable in a suit by an employe against an employer for negligent injuries, *even though the fellow servant rule is in force.*

Byers vs. Carnegie Steel Co., 159 Fed. 347, 351, (C. C. A. 6th Ct.);

Hunter vs. Illinois C. R. Co., 188 Fed. 645, 651, (C. C. A. 6th Ct.);

American Car & Foundry Co. vs. Barry, 195 Fed. 919, 921, (C. C. A. 8th Ct.).

XLVI.

A prima facie case of negligence against a railroad in its operation of its trains, is made out by showing that a switch was open and that the train ran into it whereby the engineer of the train was killed.

St. L. I. M. & S. R. Co. vs. Ramsey, (1910) 131 S. W. 44, 96 Ark. 37;

St. L. I. M. & S. R. Co. vs. Davis, 124 S. W. (Ark.) 754;

Internat'l & G. N. R. Co. vs. Johnson, 55 S. W. (Tex.) 772;

Galveston H. & S. A. Ry. Co. vs. Thompson, 116 S. W. 106, 110;

International & G. N. R. Co. vs. Bradt, 122 S. W. 59;

Trimmer vs. Atlantic & C. A. Ry. Co., (S. C.) 62 S. E. 209, 211.

XLVII.

In a case where a railway train was operating a rotary snowplow over the company's road in Alaska, and a bridge gave way as the train passed over the bridge, some of the supports of which had been burned, causing the engine to

turn over and kill deceased, it was held, *that such facts were sufficient to show actionable negligence on the part of the railroad company.*

Copper River & N. W. Ry. Co. vs. Reed, 211 Fed. 111, (C. C. A. 9th Cit).

XLVIII.

The case of *Edgar vs. Rio Grande West. R. R. Co.,* 32 Utah 330, relied upon by plaintiff in error, *is so different in its facts, from the case at bar,* that it is not in point for the following reasons:

1. That a person had observed that the lock of the switchstand was unlocked, *that he removed the lock, examined it, and then returned it to its proper position about nine o'clock of the day of the accident.*

Edgar vs. Railroad Co., 90 Pac. 745, 746.

2. That the agent of the Union Pacific Railway Company had been supplied with a key to the switch and had permission to use the switch on the Rio Grande railway tracks in transferring cars from one road to the other, and at about nine o'clock on the day the accident occurred employees of the Union Pacific Railway Company *procured the key from the agent and after using the switch and tracks in question returned the key to the agent at about 9:30 o'clock of the same afternoon.*

Edgar vs. Railroad Co., 90 Pac. 745, 746.

3. In the case of *Edgar vs. Railway Co., supra,* the court said: *"The evidence we think conclusively shows that the unlocked condition of the switch was not the approximate cause of the death of the deceased, nor did it in any manner contribute thereto."*

See 90 Pacific, 747.

XLIX.

The *significant fact that the defendant failed to call the members of the night switching crew, who worked in this yard the night before and up to seven o'clock in the morning of the day of the accident, and that this crew were customarily in the habit of taking cars off the adjoining sidetrack and switching them over this switch of the main line in order that they might take them to the shop to be repaired, and the further fact that this night crew, working until seven o'clock in the morning of this accident, had to switch passenger coaches over this switch, is a circumstance to be considered in determining whether the agents or trainmen unlocked this switch and left it open.*

LI.

The fact, if it be a fact, that the freight engine and tender went north on the main track through this switch a short time before Spellman's train, *does not show that at that time the switch was locked, as there is no testimony showing or tending to show that this engine and tender might not have passed over the main line running slowly without derailment, and if this engine and tender did pass over the main line it is very probable that the passage thereof over this switch, in its unlocked condition, would cause a change in the condition and position of the switch points and rails, which, in part, aided the derailment of the passenger train which followed, moving at a much higher rate of speed.*

LII.

There was no train out of Oelwein on the afternoon of March 28th, 1910, between 12:15 and the time of the derailment of the passenger train. (Transcript, 26.)

LIII.

Trains bound south would pass through the switch without derailment and would be likely to press the switch point over against the east rail.

LIV.

It is more logical to attribute the unlocking of the *switch to some member of the night or even the day crews employed in the yards, than to uphold the contention of plaintiff in error, that some unknown person, not shown to have existed, nor to have had any motive whatever to unlock the switch and leave it open, had purposely tampered with the switch and left it open, knowing that it would probably result in wrecking a train and seriously, if not fatally, injuring one or more persons.*

Internat'l & G. N. R. Co. vs. Johnson, 55 S. W. 772, 790.

LV.

The fact that the day switchmen testified that they had not left this switch open or been over it, notwithstanding on cross examination, *they admitted* they could not locate the particular switching they had done after they went on duty at seven o'clock in the morning and down to the time of the happening of the accident, is not conclusive, because

no one *knowingly or intentionally left the switch open.* The fact is, without dispute, that the switch *was left open, that no other than employees of the defendant are shown to have been at or in the vicinity of the switch, that the switch was kept locked and that no one but the agents and trainmen of the railway company had keys to open the lock; that the night crew had used the switch between seven o'clock of the day before and seven o'clock of the morning of the day the accident occurred, turning passenger coaches, and in all probability to switch out bad order cars to the main line so they could be taken to the shops, and none of the night crew were placed upon the witness stand by the defendant to testify.*

LVI.

This was an important switch on the main line of this railway, over which the swiftly moving passenger trains were drawn. Considering the extra hazard which this switch, unlocked as it was, subjected the employees on each passing train, and the unlocking of it and leaving it open by the trainmen, constituted the grossest negligence.

LVII.

The plaintiff in error seems to have had the theory that by calling *members of crews that testified they had nothing whatever to do with the switching in and out of cars over this switch, and by failing to call members of switching crews that did use this switch between seven o'clock P. M. of the day before the accident and seven o'clock A. M. the day of the accident, that they established conclusively that the members of the night switching crews had not left this switch open.*

LVIII.

The failure to call the members of the night crew who were switching cars over this identical switch between seven o'clock of the night before and seven o'clock of the morning of the accident, *naturally causes the presumption to arise that the members of the night crews who were over this switch would not have helped the defense.*

LIX.

The undisputed fact that this passenger train was derailed by being suddenly turned from the main track to the switch track, and that the engine was turned over, it would naturally follow that the switch points after the accident

would not be likely to be in the same situation they were in before the derailment, because the turning aside of the engine and its running on the ties and turning over together with its sudden stop, would be sure to disturb the position of the switch points and change their position from the way they were when the passenger train reached the switch and from the way they were when the engine and tender went through before the accident if in fact they did go through as claimed.

LX.

The conclusion of counsel for plaintiff in error, at the bottom of page 11 of their brief and argument, is not sustained by the record, and there are several errors in their synopsis of the evidence as stated upon page 19 of their brief and argument for plaintiff in error, among which are the following:

1. The switch was not last used "the day before the accident for turning the same train." It was used between seven o'clock P. M. of the day before and seven o'clock A. M. of the day of the accident, in turning passenger trains. As Paul Vermillion testified, "That was done once after the arrival of this train that was derailed, and *once along about two or three o'clock in the morning, with some equipment of other trains that arrived during the night.*" (Transcript, 15.) And Becker testified that, "the night crew went on at seven o'clock at night and off at seven o'clock in the morning." (Transcript, 71.) *That this night crew switched out cars from the sidetracks over this switch on to the main line.* (Transcript, 71.) *That this night crew would turn coaches which came in on a night train from Des Moines, and a dining car that came up from Omaha.*" (Transcript, 71.)

2. It is said in Proposition 11 on page 19 of the "Brief of the Argument" for plaintiff in error, that, "None of the crew that did the switching left the switch open." This conclusion is stated from the testimony of members of the *day crew* who went on duty at *seven o'clock in the morning* of the day of the accident. It can have no reference to the *night crew* that did the switching over this switch, *none of whom were called.*

3. It is said by plaintiff in error in the 11th proposition on page 19 of their Brief of the Argument, "After the switch was last used a *number of trains from the southwest passed over the switch going into Oelwein.*" This statement has reference to the switching of the day train on the day before at 2:30, and *ignores the switching that was done by the night crew of passenger coaches, a dining car and cars in bad order,* between seven o'clock P. M. of the day before and

seven o'clock A. M. of the day of the accident. (Transcript, 14 and 71.)

4. *There is no evidence that the main line track with the switch track, were in the condition they were after the accident before the engine was turned aside and derailed.*

5. Plaintiff in error in their 11th proposition of the "Brief of the Argument", on page 19 thereof, states that after the accident, "the padlock was hanging down on the switchstand and *out of the hasp*", when Vermillion testified, "I saw the lock hanging *in the hasp*" (Transcript, 16), and Sheriff testified that he found "the lock *hanging in what I call the eye*". (Transcript, 6.) Witness Young testified, "The lock was hanging down *in the eye.*" (Transcript, 10.)

6. The plaintiff in error in their 11th proposition of their "Brief of the Argument" on page 19 thereof, says that "the lock on the switchstand the day the wreck occurred was in such condition that when *placed in the hasp and locked, by pulling on the chain it could be unlocked*" which is in conflict with the statement of the only witness testifying on the question, J. L. Ervin, who testified as follows on cross examination:

Q. You don't mean to say you pulled it open by this chain attached to the lock?

A. No, sir.

Q. But this lock, you are sure, on the 28th of March, 1910, was in such condition that you could pull it open like that, (indicating)?

A. Yes, sir, *right about that time.* (Transcript, 76.)

LXI.

Between *seven o'clock in the morning when the night crew quit switching and the happening of this accident, the only engine that passed north on the main line, so far as the record discloses, was the freight engine which it is claimed passed over the switch at the speed of about ten miles an hour a short time before the accident.* (Transcript, 26.)

LXII.

The contention of the plaintiff in error that its evidence shows "conclusively and without dispute" that it was not responsible for the open switch, is not supported by the facts in the record, nor the authorities cited to sustain it, and the further claim, that whether the evidence is sufficient to overcome the presumption arising from the application of the doctrine of *res ipsa loquitur* "when undisputed, is for the court and not for the jury to determine." This court in two recent decisions have held to the contrary.

Sweeney vs. Erving, 228 U. S. 233, 240;

Minn. & St. L. Railroad vs. Gotschall, 244 U. S. 66, 67.

See also:

Steed's Executors vs. Course, 4 Cranch 413;
Home Insurance Co. vs. Weide, 11 Wallace 440;
Schooner Jane vs. U. S., 7 Cranch 365;
Thompson vs. Bowie, 4 Wallace 473;
The Wenona, 19 Wallace 58;
Holmes vs. Goldsmith, 147 U. S. 164;
Castle vs. Bullard, 23 Howard 187.

LXIII.

There is no claim made in the brief and argument for the plaintiff in error in this court, that Spellman was guilty of contributory negligence, and under the facts in the record which show that the target was *only slightly turned*, and its position *was difficult to discover at the time of the accident.* (Transcript, pages 9, 10.) James Sheriff testified that "the switch stand *could not be seen clearly from the south, the way the sun was shining it* made a blur on it." S. E. Young, another witness for plaintiff, testifying "the target at the time (of the accident) was turned just a little, but what degree I could not say, but it was turned but not enough to show that the switch was open." (Transcript, 7, 10.)

LXIV.

The question of whether the engineer was in the exercise of ordinary care for his own protection was for the jury. Moreover, if they found that he contributed in some degree to the injury it would go in diminution only under the terms of the Employers' Liability Act. The trial court having heard the evidence and having seen the witnesses, *determined that the verdict was sustained by the evidence without the application of the doctrine of res ipsa loquitur.* The Supreme Court, after carefully and exhaustively examining and considering the case, *unanimously concluded* that the verdict was sustained by the evidence, and this court has repeatedly held that in this state of the record it will not disturb the finding of the state courts.

Seaboard Air Line Railway vs. Padgett, 236 U. S. 668, 673;
Seaboard Air Line Railway vs. Koennecke, 239 U. S. 352, 355;
Great Northern Railway Co. vs. Knapp, 240 U. S. 464, 466;
Baugham vs. New York, P. & N. R. R., 241 U. S. 237, 241;

Baltimore & Ohio Railroad Co. vs. Whitacre, 242 U. S. 169, 171;
Seaboard Air Line Railway Co. vs. Lorick, 243 U. S. 572, 574;
New York Central & Hudson River Railroad Co. vs. Towsellito, 244 U. S. 360, 361.

ARGUMENT.

Counsel for defendant in error having with great care and detail, stated the propositions of law and fact on which they rely, feel that they cannot make their position clearer by extended argument or elaboration of propositions there stated. We have given to the court in the propositions stated, the reasons why we think this case should be promptly affirmed, and feel that we would not be aiding the court by further elaboration of the points and propositions presented by extended argument.

Respectfully submitted,

THOS. A. CHESHIRE,
Attorney for ~~Plaintiff~~ Defendant in Error.

HOWARD J. CLARK,
Of Counsel.

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JAMES D. MAHER
CLERK

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. [redacted]111

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Plaintiff in Error,

vs.

L. W. BASHAM, Administrator of the Estate of John J. Spellman, Deceased, *Defendant in Error*.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

GEO. H. CARR,
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DONALD EVANS,
O. M. BROCKETT,
Attorneys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

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CHICAGO GREAT WESTERN RAILROAD COMPANY,
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L. W. BASHAM, Administrator of the Estate of John J. Spellman, Deceased, *Defendant in Error.*

REPLY TO BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR

Thru an inadvertence, the Brief and Argument for plaintiff in error in this case carried the number "910", instead of "901", which is the true number as given by the Transcript of Record. Our attention was called to the inadvertence by the Clerk, and it is our understanding that our Brief was given the correct number of the case by him.

On the 26th day of November, 1915, the Supreme Court of Iowa filed their opinion herein affirming the judgment of the District Court of Polk County, Iowa, in favor of the plaintiff, L. W. Basham, administrator of the estate of John J. Spellman, deceased. The opinion will be found set out in full beginning on page 77 of the Transcript of Record. A petition for rehearing having been submitted to the Supreme Court of Iowa by the Chicago Great Western Railroad Company, that court, on the 7th day of April, 1916, filed its supplemental opinion withdrawing the third paragraph of the opinion and substituting a new paragraph "dealing directly and solely with the point made by defendant, that the cause of action stated by the amended petition was barred by the statute of limitations". (Transc., page 92.) The supplemental opinion closed with the following language: "In

preparing this opinion for official publication, the reporter of this court will make the substitution of the third paragraph as above indicated. As thus modified, the opinion will stand, and the petition for rehearing is overruled." (Trans. p. 95.) Thereafter, the Railroad Company having submitted to the Supreme Court of Iowa a petition for rehearing of the supplemental opinion, the same was, on the 18th day of December, 1916, overruled. (Trans. p. 112, Stipulation 7 as to papers to be included in making up transcript.)

From the certificate of the clerk of the Supreme Court of Iowa, it appears that on the 26th day of November, 1915, that court filed a written opinion affirming the judgment of the District Court and ordering the issuance of a writ of procedendo. (Trans. p. 96.) It further appears from the certificate of said clerk that on the 7th day of April, 1916, the Supreme Court of Iowa filed their written opinion overruling the petition for rehearing and ordering the issuance of a writ of procedendo. (Trans. p. 96.) It further appears by the certificate of said Clerk that on the 18th day of December, 1916, appellant's second petition for rehearing, having been fully considered, was overruled. (Trans. p. 97.)

Counsel for defendant in error begin their Brief and Argument by criticism of our opening statement. It is said that it does not fairly or correctly state the issues as set forth in the pleadings. It is asserted that it appears from the averments of the petition that the decedent, John J. Spellman, at the time of his injury *was engaged in interstate commerce*, and that the right of recovery, if any, was under the Federal Employer's Liability Act.

The petition appears on pages 1 and 2 of the transcript. After alleging that the plaintiff brings the suit as administrator of the estate of John J. Spellman, deceased, it is alleged that defendant is a corporation engaged in owning and operating a railway thru the states of Iowa, Illinois, Missouri and Kansas; that deceased was an employe of the defendant railway company as an engineer, and that the engines on which he worked were used for drawing a regular passenger train running between Kansas City, Kansas, and Chicago, Illinois; that the run of said Spellman was between Des Moines and Oelwein. The negligence on which plaintiff relies for a recovery is then set out. It is then averred that on account of the death of said Spellman, *his estate* has suffered and sustained great damages, to wit, in the sum of $20,000.

The contention of counsel that "from the statements in the petition originally filed, the liability, if any, was to be determined by the Federal Employer's Act" is not in harmony with the record. On the contrary, it clearly appears from the recitals of the petition that the action was brought to recover under the general law or law of the State of Iowa, and not

under the Federal Employer's Act. Damages to the estate could not be recovered under the Federal Act. It was necessary to a well drawn petition under the general law to allege the business in which the defendant company was engaged; it was also essential to a well drawn petition to allege the capacity in which Spellman was employed by the defendant. There can, we think, be no doubt that if the Federal Employer's Liability Act had never been enacted, the petition would have contained the same allegations. But it is said that defendant demurred to the petition on the ground that it showed the action was brought under the Employer's Liability Act. The Iowa courts did not sustain the defendant in this position, thus holding that the petition pleaded a cause of action under the general law and not under the Act of Congress.

It is said:

> "The Supreme Court of Iowa did not hold that the cause of action as originally stated in the petition was brought under the state law, nor did it hold that there was a change from law to law by filing the amendment to the petition."

The supplemental opinion of the Iowa court does not sustain counsel in the view above expressed. The court held that the statute of limitations affords no defense in this case. This conclusion is bottomed upon the following considerations: The suit was originally brought and has ever since been maintained by the administrator, who is the proper party to prosecute it whether it be maintained under the law of the State or the Federal Employer's Liability Act; the cause of action in either case is the death of Spellman occasioned by the negligence of the defendant; whether the action be brought in one form or the other, it is by the same party, against the same party, in the same court, for damages for the same alleged wrong, the sole distinction being in the measure of damages to be recovered and the person or beneficiary to whom the plaintiff must account for the damages, if any, which he collects. It is then said:

> "Now assuming that plaintiff seeks to recover under the statutes of the State, and alleges a good cause of action, but before the case is brought for trial, or even pending the trial, it develops that the deceased was injured while engaged in interstate commerce and that to sustain a verdict in favor of the administrator, the petition should allege that he was survived by a dependent wife or family, an amendment to the petition adding such necessary averment does not, in the

judgment of this court, state a new cause of action permitting the defendant to successfully interpose a plea of the statute of limitations."

The court then proceeds in its attempt to justify the above stated conclusion of law by a review of the authorities.

Counsel's claim that the Iowa court, in the supplemental opinion, was deciding a mere "moot" question, and that it did not hold that the statute of limitations was not a good defense basing its conclusions upon the assumption stated in the opinion, is without merit.

It appears from the allegations of the petition that Spellman died on the 28th of March, 1910. The petition was filed on the 21st of April, 1911. On the 9th day of May, 1911, the defendant filed a demurrer, which was overruled on the 12th day of January, 1913. (Trans. pp. 1, 2 and 3.) On the 21st day of January, 1913, the defendant filed an answer putting in issue all of the allegations of the petition. (Trans. p. 3.) On the 13th of October, 1913, plaintiff filed an amendment to his petition setting up the fact that Spellman left him surviving a widow, and that he brought the action for her benefit. (Trans. p. 4.) On the 17th of October, 1913, the defendant filed a motion to strike the amendment from the files on the ground, among others, that it set up a new and independent cause of action and that the cause of action pleaded in the petition as amended was barred by the statute of limitations. (Trans. p. 4.) On Oct. 20th, 1913, the motion to strike having been overruled, defendant filed an amended and substituted answer to the petition as amended. Division I puts all the allegations of the petition as amended in issue; Division II pleads contributory negligence in mitigation; Division III pleads that the cause of action upon which plaintiff now seeks to recover was not set up or alleged until the filing of the amendment to plaintiff's petition on Oct. 13, 1913, and more than two years after the cause of action arose and is barred by the statute of limitations. (Trans. p. 5.) The case was tried on the issues thus formed, and at the close of the evidence, the plaintiff amended his petition as amended, alleging that Fannie L. Spellman, the surviving widow of John J. Spellman, suffered damages in the sum of $20,000 on account of his death; that plaintiff withdrew from his original petition the words " 'the plaintiff further states that on account of the death of said John J. Spellman, deceased, his estate has suffered and sustained great damages, to wit, in the sum of $20,000', the said words being merely the statement of an erroneous legal conclusion". It was agreed that the amended and substituted answer of the defendant should stand also to the petition as finally amended. (Trans. p. 5.)

Defendant in error cites *M. & St. L. vs. Winters*, 242 U. S.

353, in support of a number of propositions contained in the brief. That was a case in which the defendant in error sued to recover for personal injuries. The plaintiff alleged, and the defendant denied, that at the time of his injuries he was engaged in interstate commerce. It appears from the opinion that "at the trial, the defendant in no way saved its rights to deny that the parties were engaged in interstate commerce at the time of the accident, or to object to the application of the federal statute. On the contrary, without qualification, it invoked and relied upon the statute and the right that, because of the statute, it supposed itself to possess." It is concluded: "Therefore, even if the courts and parties were wrong about the proper basis for the suit, that fact does not entitle the defendant to have the judgment reversed. It can not complain of the course to which it assented below."

It will be observed that there is nothing in the record in this case which makes the doctrine of the *Winters* case applicable.

In the 21st division of the Brief for defendant in error it is said: "The transcript of the record in the case does not contain any assignment of errors, if any was made, on the appeal to the Supreme Court of Iowa from the trial court." Sec. 4136 of the Supplement to the Code of Iowa provides: "No assignment of errors shall be required in any case at law or in equity now pending or hereafter docketed in the Supreme Court." However, Division V of the opinion of the Iowa Supreme Court reads as follows:

> "Most of the assignments of error predicated upon instructions given and refused, when tested by the rules of law affirmed in this opinion, do not appear to have been well taken, and so far as any of them raise any questions than those construed and passed upon, we find the language used by the trial court is not open to the criticisms made against it." (Trans. p. 91.)

The Iowa court held that the question of the statute of limtations was sufficiently raised and decided it, and under the holdings of this court, the question must be deemed to have been presented with sufficient clearness to sustain a writ of error from this court to the state court. If the plaintiff in error on the trial of the case had failed to raise the objection that plaintiff's cause of action as stated in the petition as amended was barred by the two years' limitation period found in the federal act, or indeed, had gone farther, as the defendant did in the *Winters* case, and taken the affirmative position that the cause of action set up in the petition as amended was not barred, we should then have a case for the application of the doctrine of the *Winters* case. But what

are the facts? We first have the motion to strike the amendment on the ground that it set up a new cause of action and was barred by the two years' limitation period. In the amended and substituted answer, the defense was specifically pleaded. At the conclusion of the plaintiff's testimony, defendant moved the court to direct the jury to return a verdict in its favor on several grounds, including the following:

> "4. The cause of action presented by plaintiff's petion as amended is barred by the statute of limitations.
> 5. It appears from the undisputed evidence that Mr. Spellman, plaintiff's decedent, died in March, 1910, and more than two years prior to the filing of the amendment to the petition setting up the cause of action now set up by the petition as amended." (Trans. p. 13.)

At the close of all the evidence, defendant filed a motion to direct a verdict in its favor on the following grounds, among others:

> "5. The cause of action set up in plaintiff's petition as amended is barred by the statute of limitations". (Trans. p. 42.)

After the evidence was concluded and before argument of counsel to the jury, the defendant asked the court to give to the jury the following instruction:

> "2. The court instructs you that the cause of action set up by the plaintiff in his petition as amended is barred by the statute of limitations, and your verdict must therefore be for the defendant." (Trans. p. 42.)

The defendant excepted to the refusal of the court to give to the jury requested instruction #2 on the following ground:

> "The undisputed evidence in this case shows that the cause of action set up in plaintiff's petition as amended is barred by the statute of limitations. The undisputed evidence shows that John J. Spellman died on Mar. 29, 1910, and the cause of action set up in the petition as amended was not pleaded, nor was suit brought thereon until more than three years after the cause of action arose." (Trans. p. 44.)

Within the time fixed by law, the defendant filed a motion to set aside the verdict and grant a new trial, one ground of which was the refusal of the court to give Instruction #2

asked by defendant, being the instruction asked on the subject of the statute of limitations.

It thus appears from the record that the defendant, at every stage of the trial where the question could possibly be raised, insisted upon the statute of limitations, and it surely cannot be said that the plaintiff in error did not save its right to invoke the defense.

For the apparent purpose of weakening the defendant's testimony, in defendant in error's brief, page 21, it is said that "the railroad company did not call any member of the night switching crew to testify." Again on page 17, it is said: "No member of the night switching crew was called or testified for the railroad company, but some of the members of the four day switching crews testified."

The assertion that there were four day crews in addition to a night crew is not correct. There were but four crews in all, and one member of each crew testified. Mr. Linney was foreman of one of the four crews, and testified. (Trans. p. 22.) Mr. Becker was foreman of another of the four crews and testified that on the day of the accident he was foreman of a switching gang; that he was not a member of the gang Mr. Linney was foreman of; that there were four gangs in all in the yards at Oelwein; that Mr. Linney was foreman of one, he (Becker) of another, Mr. Plashal of another and Mr. Reese of the fourth; that Mr. Gibbons was a switchman and at the time was working with Mr. Reese. (Trans. p. 23.) Mr. Plashal was foreman of one of the gangs and testified. (Trans. p. 24.) Mr. Gibbons, who at the time of the accident, was a member of Mr. Reese' crew, testified. (Trans. pp. 26 and 27.) The evidence that none of the switching crews left the switch displaced prior to the accident is full and complete, and the claim that there was still another switching crew, known as the night crew, no member of which crew was called as a witness for the railroad company, is untrue.

On page 18 of the Brief and Argument for defendant in error it is said:

> "There is no claim that any of these keys to this lock were lost or in the possession of others than the switchmen and trainmen or the section foreman."

Mr. Sheriff, who was in the employ of the railroad company in 1902 to 1907 as a machinst, and who now lives at Waterloo, testified that when he was working for the company in the shops, he knew who were supplied with keys to the switches, and that he had them thrown to him several times; that the trainmen, the switchmen, the sectionmen, the hostlers had keys when he worked there. (Trans. p. 9.) Mr. Vermillion, Superintendent for the Company in 1910 testi-

fied that the switchmen, who had occasion to open and handle the switches, the engineers, the various trainmen and trackmen, firemen and sectionmen had keys; that the same key would unlock all the switches standard lock and standard keys. (Trans. pp. 18 and 19.)

Counsel's claim that no one except switchmen, trainmen and section foremen could have had a key to the lock is without force in the light of the record, showing that for years before the accident occurred, the keys had been distributed freely among the employes of the company and no regulation requiring that they be returned to any custodian.

On page 19 of the Brief it is said:

> "There was a claim made that the lock could be opened without a key, by jerking on a chain, but there is no testimony showing or tending to show that with the chain anchored to the switchstand, as shown in the photograph Exhibit C on page 3 of the Transcript, the lock could have been opened by jerking on the chain."

J. L. Ervin, special agent of the Railroad Company, testified that he was in Oelwein at the time of the accident; that he examined the switch stand and noticed the padlock hanging on the stand unlocked; that there was a spike lying there, which he took charge of, and that there were marks on it as if it had been hammered; that at that time the marks were fresh; that the lock could be unlocked without a key. (Trans. p. 32.) On cross examination he further testified:

> "I said the lock could be opened in another way; it could be jerked open with a chain; I think it could, I don't recall seeing the men do it that way, but I could do it that way; I have seen it done; I have unlocked that one, did it shortly after the accident; in opening that lock with a chain, I don't think I experimented with any other lock; I say that by putting this ring thru something solid, the lock can be jerked open, and that I did that. This lock on this switchstand on the day this wreck occurred was in such condition that when placed in the hasp and locked, by pulling on the chain you could unlock it. I could not tell how long it had been in that condition; don't know how long it had been there."

The statement that there is no testimony that with the chain anchored to the switchstand as shown in the photograph Exhibit C, the lock could have been opened by jerking on the chain, we submit is a mere quibble.

On page 20 of his Brief, counsel calls attention to the instruction of the court, in which he told the jury that

> "The fact that an accident may have happened and the deceased sustained an injury from which his death resulted at or about the time and place alleged in the petition of plaintiff does not establish the fact of negligence, nor does it raise a presumption that the defendant was negligent, for negligence must be proven.
>
> The business of running a railway engine is a hazardous one, and the employe who enters upon such employment assumes the ordinary risks and hazards indental to such employment.
>
> The defendant is not an insurer of the safety of its employes. It is only liable when it is shown to have been guilty of one or more of the acts of negligence charged, and when it is further shown that such acts of negligence were the proximate cause of the injury, and because thereof, the widow has sustained damages." (Trans. pp. 51 and 52.)

As counsel points out, the law of the case as announced by the trial court is that the negligence charged must be proven, and the fact that an accident happened raises no presumption of negligence on the part of the defendant; that Spellman, by entering the employment of the defendant, had assumed the ordinary risks and hazards incident to such employment. and that defendant could only be held liable when it is shown that it had been guilty of one or more of the acts of negligence charged in the petition. Having called attention to the law of the case as laid down by the trial court, the statement made on page 26 of the brief that "none of the cases cited (in plaintiff in error's brief) are applicable to the case at bar", seems a remarkable one.

In *Patton vs. Tex. & Pac. Ry.*, Mr. Justice Brewer points out very clearly the distinction between the case of a passenger, where the doctrine of *res ipsa loquitor* does apply, and the case of an employe, where it does not apply. From the opinion we quote:

> "That, while in the case of a passenger, the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely, * * * a different rule obtains as to an employe. The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirm-

ative fact for the injured employe to establish that the employer has been guilty of negligence. *Texas & Pac. Ry. Co. vs. Barrett*, 166 U. S. 617, 17 S. C. R., 707. That in the latter case, it is not sufficient for the employe to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was."

In *Nor. Pac. vs. Dixon*, 139 Federal, 737, 71 C. C. A., 555, decided by the Circuit Court of Appeals of the Eighth Circuit in 1905, it is said:

> "But the doctrine, *res ipsa loquitor*, is inapplicable to cases between master and servant brought to recover damages for negligence, because there are many possible causes of accidents during service, the risk of some of which, such as the negligence of fellow servants and the other ordinary dangers of the work, the servant assumes."

In *Cryder vs. C., R. I. & P.*, 152 Federal, 417, Mr. Justice Sanborn points out that the doctrine, *res ipsa loquitor*, is inapplicable to cases between master and servant, and gives the reason for it in the following language:

> "The servant assumes the ordinary risks and dangers of his employment which are known to him and those which would be obvious to one of ordinary prudence in similar circumstances. One of these risks is that which arises from latent defects, which the ordinary care of the master may not discover, in the place, articles, and machinery with which the servant works. The failure of the master to find and remove such latent defects, which ordinary care is unable to discover, constitutes no negligence on his part, because the limit of his duty is to exercise reasonable care, and the discovery and repair of such defects falls without that limit."

The reason, then, for the well settled rule of this and other Federal courts, for holding that the doctrine, *res ipsa loquitor*, does not apply in cases between master and servant, grows out of the fact that the servant assumes the ordinary risks of his employment and the application of the doctrine to cases between master and servant would be destructive of that principle.

On page 29 of his Brief, counsel asserts that "the rule that the doctrine of *res ipsa loquitor* does not apply to actions by servants has no application under the Federal Employers Act, which abolished the fellow servant rule." The cases

cited do not sustain the statement made. In the case of *So. Ry. Co. vs. Derr*, the plaintiff, who had brought an action for damages for personal injuries, was not permitted to recover. In the course of the opinion it is said:

> "Passenger actions involve a duty to exercise a very high degree of care, amounting almost to insurance, and the instances where the accident does not depend upon some negligence of the railroad or of some employe are so rare that a general rule may well rest upon the general fact. In an employe's action, the defendant's obligation is only to use ordinary or due care to provide a safe place to work or proper instrumentalities and methods, and it must be admitted that an unknown, but considerable, fraction of the injuries to employes are either true accidents or assumptions or risk, or are proximately caused only by plaintiff's carelessness; hence there is, in truth, no such common and dominant probability of negligence as in the passenger cases."

In *Ridge vs. Norfolk So. Ry. Co.*, 83 S. E. 762, it is held that an employe suing for a personal injury, must, to recover, produce evidence from which the jury may reasonably and properly infer actionable negligence.

Respectfully submitted,

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of those that are reviewable in this court not by writ of error but by writ of certiorari.

By § 7 of the latter act it was provided that the right of review under existing laws in respect of judgments entered before the act took effect (October 6, 1916) should remain unaffected for the period of six months thereafter, but at the end of that time should cease. The present writ of error was applied for within the six-months period—December 19, 1916—and the question whether our jurisdiction is properly invoked by this form of writ depends upon whether the judgment sought to be reviewed was "entered before this act takes effect" within the meaning of § 7.

The action was brought against the railway company in a district court to recover damages for the death of plaintiff's intestate, and a trial by jury resulted in a verdict and judgment for the plaintiff. Defendant appealed to the Supreme Court of Iowa, and that court on November 26, 1915, delivered an opinion for affirmance (178 Iowa, 998), and judgment was entered accordingly. A petition for a rehearing was filed, which, after consideration, was overruled April 7, 1916 (157 N. W. Rep. 192; 178 Iowa, 998), and a writ of procedendo was awarded. Thereafter a second petition for rehearing was filed, and, having been fully considered, was overruled on December 18, 1916, and judgment to that effect duly entered. The petition for allowance of a writ of error from this court, presented on the following day to the chief justice of the Supreme Court of Iowa, averred that the final order and judgment affirming the judgment of the district court was entered by the supreme court on the eighteenth day of December, 1916; and for review of this judgment a writ of error was prayed for and allowed.

We think this was a correct statement of the effective date of the judgment sought to be reviewed.

Section 237, Judicial Code, both before and since the

amendment of September 6, 1916, permits of the review by this court only of the final judgment or decree of the highest state court in which a decision in the suit could be had. It is only a judgment marking the conclusion of the course of litigation in the courts of the State that is subjected to our review. Hence, whatever its form of finality, if a judgment be in fact subject to reconsideration and review by the state court of last resort through the medium of a petition for rehearing, and such a petition is presented to and entertained and considered by that court, we must take it that by the practice prevailing in the State the litigation is not brought to a conclusion until this petition is disposed of, and until then the judgment previously rendered can not be regarded as a final judgment within the meaning of the act of Congress. We said recently in an analogous case: "If it were not so, a judgment of a state court susceptible of being reviewed by this court would, notwithstanding that duty, be open at the same time to the power of a state court to review and reverse." *Andrews* v. *Virginian Ry. Co.*, 248 U. S. 272. It results that in the present case the judgment of the Supreme Court of Iowa did not become a "final judgment" until December 18, 1916, and by reason of the nature of the only federal questions raised in the record it then was reviewable in this court only by writ of certiorari, because of the above-cited provisions of the Act of 1916.

Writ of error dismissed.